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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1903

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Petitioner,

v.

UNITED BRANDS COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, International Railways of Central America ("IRCA"), respectfully prays that a writ of certiorari issue to review the judgment entered on March 4, 1976 by the United States Court of Appeals for the Second Circuit, as to which rehearing, with a suggestion that it be *en banc*, was denied on April 23, 1976. That judgment affirmed a judgment of the United States District Court for the Southern District of New York, which dismissed petitioner's complaint against respondent, after trial on the issue of liability alone, under §§ 1 and 2 of the Sherman Act and §§ 4 and 7 of the Clayton Act.

Opinions Below

The opinion of the Court of Appeals, reported at 532 F2d 231 (C.A.2), is reproduced as Appendix A.* The opinion of the District Court, unreported, is reproduced as Appendix B. The opinion of the Court of Appeals on the first appeal, not here for review, is reported at 373 F2d 408 (C.A. 2) and is reproduced as Appendix C.

Jurisdiction

The judgment of the Court of Appeals was entered on March 4, 1976. Petitioner's timely petition for rehearing was denied on April 23, 1976; this petition was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes

The pertinent statutes are Sections 1 and 2 of the Sherman Act (26 Stat. 209, 15 U.S.C. §§ 1 and 2), Section 73 of the Wilson Tariff Act (28 Stat. 570, 15 U.S.C. § 8), and Sections 4, 4B and 7 of the Clayton Act (38 Stat. 731, 15 U.S.C. §§ 15, 15B, and 18 [1946 ed.] prior to its amendment in 1950); said statutes are reproduced in Appendix E.

Questions Presented

1. Is the attempt of an illegal monopolist (in combination with its wholly-owned subsidiary) to impose an oppressive price on its supplier, under threat of abandoning a division of the monopolist's business known to be of vital importance to the supplier, followed by such abandonment when the supplier refused to knuckle under, *per se*

* Citations to " a" are to the Appendix to this petition.

monopolization, or unreasonable restraint of trade, within Sections 1 and 2 of the Sherman Act?

2. Where, in addition, a substantial purpose of the abandonment is shown to be the maintenance of monopoly in one relevant market and the elimination of 50% of a major competitive source in another, is that a *per se* violation of Sections 1 and 2 of the Sherman Act?

3. Where a monopolist has mixed, substantial motives for abandoning a division of its business, namely, (i) to enforce a threat while attempting to price fix, (ii) to maintain its monopoly by eliminating 50% of a major competitive source and (iii) (arguendo) a legitimate business reason, did the Court of Appeals not commit error of law in legally excusing the *per se* abuses of monopoly power on the ground of the supposed legitimate business reason?

4. Where a monopolist used equipment and other predatory preferences, exacted by coercion from plaintiff's railroad, as its instrument to control effectively the quantity of competitive bananas grown and shipped over plaintiff's railroad, was that a *per se* violation that "necessarily had an impact on [plaintiff] and constituted an injury to its business" under *Zenith Corp.* v. *Hazeltine*, 395 U.S. 100, 120?

5. Did the member of the Panel, who wrote the opinion below for the Court of Appeals, improperly refuse, on timely request, to disqualify himself from sitting, where he was publicly reported to be a member of the governing board of a law school that had engaged as its dean a director and former executive vice president of the defendant?

Summary Statement of Claim

In this private antitrust action, the amended and supplemental complaint seeks recovery for injury based on violations as follows:

a. United abused its monopoly power by restricting its own banana shipments over IRCA and then eliminating such shipments entirely by terminating its division (CAG) in western Guatemala when IRCA refused to knuckle under tc United's request for an oppressive price and United carried out its threat of abandonment and also disposed of its properties in western Guatemala in a manner, by piecemeal land sales, that precluded competitors from taking its place, in violation of Sections 1 and 2 of the Sherman Act; in addition, a substantial purpose in such abandonment was to maintain its monopoly (in Central America) and knock out 50% of a major competitive source of supply (from Ecuador), both relevant markets; United acted in concert with CAG, its wholly-owned subsidiary (third claim).

b. United in concert with plaintiff and CAG obtained discriminatory preferences in its favor, by coercing discriminatory contracts in its favor from IRCA, that gave United effective control over the quantity of bananas grown and shipped by its competitors over IRCA in violation of Sections 1 and 2 of the Sherman Act (first claim).

c. United acquired 42.68% of IRCA's voting stock and controlled and dominated IRCA in violation of Section 7 of the Clayton Act; United disposed of its stock in January 1962, during the statutory period; injury is the same as in the first and third claims (sixth claim).

After trial, solely on the issue of liability, the District Court dismissed the complaint as follows: (i) the third and sixth claims for failure to prove a violation of the antitrust laws, and (ii) the first claim for failure to prove

injury. The Court of Appeals affirmed. This petition followed.

The Courts below have substantially impaired private enforcement of the antitrust laws by acquitting an important monopolist in a basic industry through errors of law and obvious and exceptional errors of fact, where the violations have caused an American corporation immediate catastrophic losses leading to loss of its entire railroad properties in Guatemala.

By confusing relevant market concepts, the Courts ruled on the monopolist's conduct as if it were confined to Guatemala, but the case had far wider ramifications. The monopolist's substantial purposes were to maintain monopoly in one market and to render a severe blow to competition in still a different market; issues the court below never reached. Moreover, by paying only lip service to the well-settled rule that *per se* violations shall not be excused by conduct that is allegedly "reasonable in the specific circumstances," (*Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, at 212; *Fashion Originators Guild* v. *Federal Trade Comm'n,* 312 U.S. 457, at 468; *U.S.* v. *Aluminum Co. of America,* 148 F2d. 416, at 428 (C.A.2)), the result below sanctions the use of "monopoly power . . . to beget monopoly," (contra *U.S.* v. *Griffith Amusement Co.,* 334 U.S. 100, 108) and, if not reversed, will constitute a substantial erosion of basic antitrust policy established by the decisions of the Supreme Court.

Statement of the Case

1. *United's Unlawful Monopoly And Discrimination Against Independents, Effected Through Control Over IRCA.* This is an antitrust action brought by IRCA against United Brands Company ("United"), (formerly named United Fruit Company), both American companies. This case was in the Court of Appeals for the Second Cir-

cuit twice. On the first appeal, decided in 1967, issues unrelated to this petition were decided. A convenient summary of certain basic facts may be taken from Friendly, J's opinion on that first appeal (76a-77a):

> "IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's [United's] banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.
>
> "In 1928 . . . UF, with 71,000 shares of common stock, [was] the largest single shareholder [of IRCA] . . . In fact UF took over control of IRCA. . . . By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S.A. (Agricola),* a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock . . . UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

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* Agricola is also referred to as "CAG".

> "From this time UF could and did control the election of IRCA's nine directors. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as 'special advisor' to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.
>
> "As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

In 1949, minority stockholders of IRCA, in its behalf, commenced a derivative action against United in the Supreme Court of New York State, entitled *Ripley, et al.* v. *IRCA* and *United Fruit Co.* The New York State Court of Appeals, 8 N.Y.2d 430, 9 N.Y.2d 758 (rearg. den. 2/23/61), affirmed a judgment of the Appellate Division, 8 A.D. 2d 310 (hereinafter termed *Ripley*), whereunder United was required to pay damages to IRCA through December 31, 1960 in excess of $9,000,000 (principal and interest), based on insufficient freight rates charged United by IRCA on United-CAG's shipments of bananas

and imported supplies over IRCA. Said judgment also fixed rates for the future, including the public tariff rate on the line haul for bananas. The court found that United controlled and dominated IRCA at least from 1928 and stood in a fiduciary relationship to IRCA, and that the inadequate rates paid by United were a breach of its fiduciary duty.

In the present action the District Court admitted certain *Ripley* findings of fact into evidence, and gave them a collateral estoppel effect as of December 31, 1955 (70a, n.1). *Ripley* found that (i) United exercised effective control and domination over the direction, management and operation of IRCA, and (ii) the IRCA Board of Directors and officers looked to the United Special Adviser for *decision* on *all* matters of railroad operation, both as to policy and detail.

A provision was added to the 1948 contracts between IRCA and United-CAG (expiration—January 1, 1968) which granted CAG, primarily, and United, secondarily, a preference on the use of all equipment leased by CAG to IRCA; namely, banana cars and locomotives. This contract requiring IRCA to discriminate in favor of United-CAG was in existence during the statutory recovery period, a material fact which the District Court completely overlooked (48a).

United gained an unlawful monopoly over the production and shipment of Guatemalan bananas to the United States through IRCA's discriminatory rate and service structure imposed by United on IRCA. Its *coercion* of IRCA was effected through United control and domination over IRCA, United's continued ownership of shares in IRCA,* and the contracts exacted by United

* United, in its answer (par. 15), admitted that "United's stock constituted the majority of all shares actually voted at IRCA's annual meetings for the election of directors from 1938 through 1960", the last term expiring in May of 1961.

from IRCA. The District Court and the Court of Appeals assumed that the antitrust violations continued in the period through December 31, 1955, and that although control and domination lapsed thereafter, the antitrust violations continued through December 31, 1960.

The statutory period for recovery commenced on February 16, 1961. United continued to own its IRCA shares until January 1962. The discriminatory contract provisions with respect to equipment continued until January 1, 1968. The discriminatory wharfage rate for bananas also continued during the statutory period. On three separate occasions (two* during the statutory period), Standard requested of IRCA that it be allowed to handle its bananas on the Barrios pier in the same manner and on the same favorable terms as United; IRCA never complied with this request. Its position was that United should pay the public rates instead of lowering the public rates to what United paid.

The District Court and the Court of Appeals both assumed that United's unlawful monopoly in Guatemalan bananas for the United States continued during the statutory period (13a, 55a).

2. *United's Threats, Carried Out, To Cutback And Abandon Tiquisate Unless IRCA Reduced The Rate Of $130 Per Car Held To Be Fair In Ripley.* Both Courts found: "Before and after February 16, 1961 United officials informed IRCA that unless the *Ripley* judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 *Ripley*-decreed rate" (8a, Fdg. 177-8). Thus, United's blueprint stated by its counsel to the New York State Court of Appeals in *Ripley* became

* One such request was made in connection with consideration of rehabilitation of Standard's plantations shortly after they were destroyed by a hurricane.

its policy: if IRCA insisted on the $130, United would take its business elsewhere, either by a different means of transportation or "by abandoning the West Coast of Guatemala in favor of some other area."

United required IRCA to charge its competitors $130 per car for the line haul commencing in 1939 and United's competitors continued to pay $130 into and during the statutory period. It was only after *Ripley* mandated that United must also pay $130 per car that United stated it was "exorbitant" and "confiscatory." United further warned in the New York State Court of Appeals in 1960 that an affirmance of the *Ripley* decision awarding IRCA a cash judgment would "break the whole relationship between" IRCA and United and United "doesn't have to grow bananas" at Tiquisate, and it may "let the bananas rot on the ground" rather than ship at the rates set in the judgment. During the recovery period, United and CAG's officers repeatedly made it clear to IRCA that it must reduce the $130 rate or else Tiquisate would be shut down. When IRCA refused to knuckle under, United abandoned Tiquisate, in 1964.

In September 1960, United and CAG had acknowledged that future banana shipments from CAG on the west coast of Guatemala over IRCA to Barrios were *vital* to the *survival* of IRCA since they represented the single greatest source of revenue for IRCA. The foreseeable consequence of United-CAG's abandonment of Tiquisate brought on the collapse of IRCA in Guatemala at the end of 1968. It defaulted on a $4,000,000 loan from the Guatemalan Government, secured by a mortgage on its Guatemalan properties; the Government instituted a foreclosure action, obtained a judgment thereunder and took over IRCA's Guatemalan properties and operations. Plaintiff claims this loss was caused by United's antitrust violations or in any event was subsequent evidence of plaintiff's permanent damage in 1964.

3. *United's Early Problem With Ecuador.* United's conduct in the Guatemalan market must be considered in connection with its conduct in the other markets, all based on undisputed evidence. One glaring omission by the Courts below is the importance of Ecuador in the entire scene. Prior to the 1950's, almost the entire supply of bananas for the United States market originated in Central America (including the Caribbean). In the period 1954 through 1956, United's share of the Central America market (as a source of supply) was approximately 80%. In the 1950's and early 1960's *independent* imports into the United States from Ecuador increased significantly so that by 1955, they amounted to 12 million stems, in 1960 18 million stems and by 1963 21 million stems. That increase was accomplished despite the fact that Guatemala and Honduras enjoyed a huge ocean freight advantage over Ecuador; for example, the per ton cost from Guatemala to U.S. Gulf ports was $13.50 as contrasted with $33.50 from Ecuador, a 150% cost advantage.

As a result of the Ecuador competition, United's share of the United States market declined from 70% in 1950 to 63% in 1955, to 57% in 1960, to 48% in 1963 and 42% in 1964. That Ecuadorian competition also caused a steep decline in the average price per 100 lbs. received by United at all U.S. ports from $7.43 in 1955 to $5.33 in 1960—a decline of over $2.10 per 100 lbs. On United's 2 billion pounds imported into United States ports in 1960, that meant a drop in revenue from 1955 to 1960, of over $42,000,000. The principal cause for this drastic decline in United's profit was the sharp reduction in market price of bananas resulting from the increased supply of competitive Ecuadorian bananas. United was following a policy of dumping Ecuadorian bananas in the United States at an out of pocket cash loss; the more it shipped, the more it lost. The Court of Appeals characterization was: "what once was a profitable banana business began to

deteriorate during the 1950's" (8a); a most charitable view. Of course it was "a profitable banana business" when United had monopolized the U.S. market with its 70% share.

United's major problem was, therefore, what means it should employ to meet the competition from Ecuador. United's initial theory, in the late 1950's and early 1960's, was to restrict its own production in its Central America divisions (including western Guatamala) and increase its purchase of the best quality bananas in Ecuador with the view that any bananas it purchased would be foreclosed from competitors. The result would be a limitation on the total United States supply.

In 1958, United imported 3 million stems from Ecuador; all bananas it sold on the east coast of the U.S. that year were at an out of pocket cash loss. In 1959 and 1960, United increased its purchases from Ecuador and its shipments to the U.S. went from 3 million stems in 1958 to 6.5 and 7.4 million stems in 1959 and 1960, respectively; again, all bananas sold by United at the Gulf and East coast ports were at an out of pocket loss.*

United, for anticompetitive purposes, was holding down its production in western Guatemala in order to make its open market purchases in Ecuador and so limit the total supply coming into the United States.

4. *United's Cutback at Tiquisate.* In 1959, after the affirmance by the N.Y. Appellate Division in *Ripley,* United, in order to put a price squeeze on IRCA, and as part of its program of increasing purchases of Ecua-

* Thomas Sunderland became United's president in November 1959 and continued the policy of dumping. The statistics show that for the period 1958 through 1960, United would have done better on U.S. east coast sales with bananas from western Guatemala.

dorian bananas, ordered no further plantings of Gros Michel bananas at Tiquisate for the next five years. United knew, of course, that as its production went down, its "costs will go up" and that the Tiquisate operation would therefore become unprofitable. In each year from 1955 through 1958, CAG planted another 2000 acres at Tiquisate. This tended to keep the total cultivated acreage about the same because of acres lost to Panama disease and blowdowns. If that program had continued during the period 1959 through 1963, it would have more than replaced abandoned acres.

Cocos bananas were being grown successfully at Tiquisate and their yield there far exceeded the Gros Michel. For a very brief period there was a company policy not to plant Cocos; in January 1962 that policy was changed and an officer of United stated that "new plantings" at Tiquisate "should undoubtedly be in Cocos". As the head of United's agricultural department stated, if the Cocos program for Tiquisate "had been carried out as planned", shipments from Tiquisate during 1962 would have increased by 200% with a profit of about $5,000,000. The District Court's finding that the "planting of Cocos was an interim measure" is contrary to the overwhelming statistics showing that by 1965 38% of United's then existing acreage throughout all its divisions of 97,375 acres was in Cocos bananas.*

5. *United's Critical 1963 Plan.* The competition from Ecuador did not change the situation in Central America

* In the regular course of business United, annually, had limited abandonments in each of its divisions due to factors such as Panama disease. From United's formation through 1962, it abandoned more than 925,000 acres of Gros Michel banana cultivations—mostly due to the ravages of Panama disease. This is an average of about 15,000 acres per year. Therefore Panama disease was not limited to Tiquisate but was present throughout United's entire operation.

and United continued to maintain its monopoly power there with 75% of the supply for the U.S. market in 1959-1960 and 71% in the period 1962 to 1964. Since the pre-emptive purchasing and dumping policy had not stemmed the flow of independent Ecuadorian imports into the United States, United in 1963 decided on a new five year plan. In that connection, as the District Court found:

> "Part of the plan was to eliminate Ecuador as a regular source of supply for the United States and Canada by the end of 1965 . . . This necessarily meant that United would limit its production to certain areas in Central America and thus hope to compete against independents from Ecuador by high yield production of the Valery, fully boxed, and shipping from Central America with a competitive ocean freight advantage over Ecuador. As part of this program United decided to phase out Tiquisate."

United implemented this plan. Thus, United's arrivals from Ecuador to the United States declined from 7.4 million stems in 1960 to 0.3 million stems in 1965, and thereafter to zero.

United had to maintain its Central American monopoly, otherwise, the entire plan would be subverted. United executives stated in writing to Mr. Sunderland that their major fear was a shift by competitors from Ecuador to Central America as a source of supply, to wit, that "planting of *variety* bananas by competitors *nearer the market* than Ecuador for the U.S. market could increase" and that "could have an adverse effect on the United Fruit Co. greater than anticipated."* They also stated:

> "Everyone remembers only too vividly the pricing and marketing debacle of the summer of 1960 and the more recent one during the fall of 1963. An over-

* Emphasis supplied throughout, unless otherwise noted.

> supply situation in the banana industry is similar to an oversupply situation with an agricultural commodity with one significant difference—the product cannot be inventoried to bring supply and demand into some semblance of balance. It must be brought to market or lost."*

In 1964, United imported 19.5 million stems into United States ports from Central America and by 1968 increased these to 31.2 million stems, an increase of 11.7 million stems. In 1964, *independents* imported 22 million stems into United States ports from Ecuador and by 1968, this was down, by 10 million, to 11.9 million stems (and stayed below that level in the 1969-1973 period). Obviously, United's 1963 plan to use its Central American monopoly to knock out a major part of its Ecuador competition was successful.

As a result, United's monopoly over the supply of Central American bananas for the United States market increased from 71% in 1964 to 76% in 1965, 76% in 1966 and 75% in 1967 (decreasing in 1968 to 68%). Thus United successfully enhanced its monopoly power over the Central American supply for the United States market in the relevant period.** In turn, Central America's share of the entire United States market increased from 63% in 1965 to 70% in 1966, 73% in 1967 and 80% in 1968.

The final element in the plan, as noted by the District Court, was the "phase out of Tiquisate" which was implemented when United terminated its operations and shipments there in July 1964. But the success of the entire plan depended upon denying competitors access to Guate-

* In a 1961 memo a United official stated "Any action that we take in any division may affect prices in the United States if it affects total supply."

** United's share of the U.S. market increased substantially, from 42% in 1964 to 54% in 1966.

mala west in order for United to maintain its Central American monopoly. Production of up to 9 million stems in the hands of competition in western Guatemala, with the same ocean freight advantage as United enjoyed from Barrios to gulf and eastern ports of the United States, would have destroyed United's plan. United's projections show that Tiquisate, on a landed *cost* basis at U.S. gulf ports, for Valery's, boxed, would be at least 20% lower in cost than bananas from Ecuador.

Unless Tiquisate's potential 9 million stem production was denied to United's competitors, its five-year plan would fail, since the 10 million stem drop-off by Ecuadorian independents would be replaced by 9 million competitive stems from western Guatemala. The results would have been devastating for United since it would have encountered an additional major competitive source of supply in Central America with all the cost advantages Central America enjoyed plus the destructive effect on the U.S. price structure for all United bananas.

There was only one conclusion: at all costs, United must not permit a competitor to take over Tiquisate as a going concern, whether or not it received credit for partial or complete compliance with the antitrust decree entered by consent against United in 1958. Deferring the creation of a competitor, required by the decree, to 1972, meant that United was able to retain over 25% of its market and the profits from it for 8 years and the price structure on all its bananas in that period remained at a significantly higher level.*

Thus, the phaseout of Tiquisate and refusal to sell it as a going concern was part of United's plan to maintain its

* United banana imports into the United States declined by 25% between 1971 and 1973, the years immediately before and after United's sale of Bananera (in eastern Guatemala) to Del Monte in 1972 pursuant to the 1958 consent decree.

monopoly position in Central America, foreclose competition and use its monopoly position in Central America to knock out over 10 million competitive stems of fruit, annually, from Ecuador.

6. *United Terminated Negotiations With Chalk For Sale Of Tiquisate Division As A Going Concern.* The District Court stated "if there had been affirmative misrepresentations to Chalk" (56a), there might have been an objective finding that United's conduct was "ulterior in motive." United advised Chalk that "an additional investment of $9,000,000 based on present day costs" would be required to enable a company to build up production of the Valery bananas at Tiquisate. In fact, based on the underlying data in United's Miller 1961 Report, it would have required less than 2½ million dollars, not 9 million, to accomplish that result.

United advised Chalk in writing that the value of Tiquisate "as a continuing and going concern to someone interested in producing and exporting bananas would be substantially over the salvage figure of 6½ million dollars" (United's cost of the production and transportation assets was $23,000,000). Despite this fact, the minutes of the Board of Directors' meetings of United and CAG made no mention of selling Tiquisate as a going concern. That is contemporaneous evidence that it was United's intention to eliminate Tiquisate as a source of supply. For that reason United tore up 90 miles of rails at Tiquisate and stripped the land of irrigation and disease control equipment.

The record evidence demonstrates that Chalk, Chairman of the IRCA board, was a ready, able, and willing prospective purchaser who stood to benefit substantially by Tiquisate's continuing operation as a going concern. Chalk, in the presence of United's counsel, advised the Justice Department that "*we have a railroad*" and "to give up 2500

employees is a serious thing politically . . . there is an answer. *Don't terminate.* I am *ready, able and willing* to do business . . . [I] would be a strong competitor in the banana business." United's counsel stated that "As Chalk presented the proposal it was clear that he initiated negotiations and not United." After the Justice Department conference, United's counsel advised it that Chalk "is very *anxious* to acquire United's assets on the west coast of Guatemala". That conclusion by United's counsel is far different than the District Court's characterization of Chalk as "slippery" when Chalk did not appear as a witness, as the documentary evidence demonstrates that Chalk initiated discussions and was aggressively pursuing United. After Chalk submitted a written proposal to United dated December 30, 1963, it was United that decided not to sell to Chalk, *not* because of Chalk's character or financial position, but only because United decided not to create a competitor in Tiquisate at that time. The contemporaneous evidence shows that the excuse given to Chalk was in fact a coverup. The only contemporaneous evidence of United's critical meeting on January 9, 1964, records the names of those people present and states "Re; Consent Decree Problems"—"All present were in favor of not selling to Roy Chalk". Clearly, it was United that terminated the negotiations and not Chalk as found by the District Court. In fact, United conceded below* that it decided "to terminate the Chalk discussions."

At first, United was interested in selling to Chalk and obtaining partial or complete compliance with the consent decree which required United to submit a plan by 1966 for the creation of a competitor that would be importing 9,000,000 stems of bananas, annually, into the United States. The creation of Chalk as a competitor in 1963 with a production capacity of 9,000,000 stems at Tiquisate would have ultimately meant that United's share of the United States

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* District Court Brief (DB 212).

market in the post-1963 period would have dropped significantly (by approximately 25%, *supra*) which would have meant lost profits in the period 1964 through 1972 (the date when United ultimately sold Bananera). Therefore the issue that presented itself to the United meeting in January 1964 was, is it better to sell Tiquisate to Chalk and create a competitor now or is it better to shut down Tiquisate as an operating division and make certain that Tiquisate is foreclosed to competition? The answer from a monopolist's standpoint was obvious. It would have been far more costly to United to create a competitor in 1964 than to incur the loss of value from not selling Tiquisate as a going concern. Even though demanded, United never produced any contemporaneous minutes of that meeting of January 9, 1964.

The statements United made to Chalk during the discussions in 1963, evidenced by contemporaneous documents, demonstrate that Messrs. Fox and Sunderland did not honestly believe (as they testified in 1974) that Tiquisate was the worst place to grow Valery bananas. Sunderland and Fox stated that Tiquisate "would produce beautifully in the new [Valery] banana", "and can put together 20,000 or 30,000 acres of the "best banana land", "You can have just as big a division as you want." *"There is all the land in the world there in Tiquisate . . .",* and in the Valery it can produce 400 stems per acre.

The January 9, 1964 meeting of United's executives was called to consider Chalk's letter of December 30, 1963, in which he stated that he wanted enough acreage to produce 9 million stems, and would be willing to purchase outright the necessary acreage to produce 4.5 million stems and enter into an associate producer program for an additional 4.5 million stems, which was in conformity with earlier discussions with United.

There is no evidence that United construed Chalk's proposal as a desire to obtain United's facilities "for noth-

ing," as the District Court held (56a). Moreover, United never questioned Chalk's financial capability.*

The only other document explaining the January 9th meeting was prepared by United's outside counsel, after the commencement of the litigation. That document supports plaintiff's position. Its main thrust was never discussed by the Courts below. It shows that United's meeting was called for the purpose of considering Chalk's letter of December 30, 1963 and one of the alternatives considered was to "enter into negotiations with Mr. Chalk looking forward to the sale to him of assets . . ." One of the other alternatives considered, and which United opted for, was a cover-up for a turndown to Chalk, namely, United could advise Chalk that there were not sufficient assets remaining in Tiquisate to make it practical to proceed along the lines of their letter of December 23, 1963.

United counsel's memo also shows that the critical reason why United did not further negotiate with Chalk was its desire to buy the time remaining to it, to wit, to 1966, before submitting a plan for creating a competitor in compliance with the consent decree:

> "Since United's *planting, boxing and marketing operations* were in a period of transition, United *should take advantage of the period remaining to it* to prepare and submit a plan of compliance with the Consent Judgment."

United did not want to turn the banana production capability at Tiquisate over to competition in 1964. It knew that, if it sold to Chalk when it was plannng to shift to full scale reliance on Central American production of the Valery to beat down Ecuadorian competition, it would be adding another competitor, who would be in closer proxi-

* The unchallenged evidence established that a company controlled by Chalk had an equity of over $8,000,000.

mity to the United States market. What United wanted was less, not more, competition. Thus, foreclosure of competition was a significant United motive in not selling to Chalk.

7. *United Did Not Seriously Attempt To Sell Tiquisate As A Going Concern To Others.* A contemporaneous United transcript demonstrates that in November of 1963 when Sunderland and Fox met with United's competitor, Ecuadorian Fruit Company, the latter asked to be given consideration as a purchaser on the sale of assets under the consent decree. Sunderland and Fox made no mention of the immediate availability of Tiquisate even though the Board had authorized the sale of the assets of CAG and even though Sunderland at that time knew that the variety test at Tiquisate was in excellent shape.

For all practical purposes, United disposed of the land at Tiquisate in such a manner as to make certain that no one would come in and grow bananas there and no one did.* It sold at least 5,500 acres to its employees and former employees who undoubtedly would not go into the banana business; it sold to farmers who would "undoubtedly . . . plant it to cotton"; it removed irrigation equipment necessary to banana cultivation; it tore up 90 miles of tracks at Tiquisate; and in some instances it exacted formal conditions against banana production in its leases.

8. *It Was Error Of Law To Consider The Mass Of Economic And Agronomic Data; In Any Event, That Data Showed Obvious And Exceptional Error In Finding That Tiquisate Was The Worst Place To Grow Valerys.* The findings of fact and undisputed evidence established per se violations of the antitrust laws, which should have cut off any consideration of whether there

* Banana land abandoned to Panama disease is ideal for growing Valery bananas.

was a legitimate business reason for the abandonment (*Fashion Originator's Guild, supra; Klor's supra; Aluminum Co. of America, supra*).

United's 1963 research reports on Valery trials at Tiquisate stated that the trials at Tiquisate "should go a *very long way* towards determining the *future* of Tiquisate as a banana division" since they were in "*excellent* shape", and later that year, stated that "the yields obtained—. . . *are so excellent. Decisions probably depend on other factors*" (original emphasis); the quality of the fruit was "exceptionally good", and despite the wind velocities of 25 to 40 miles per hour "there were *no* stems of fruit lost" and "there was very little leaf damage". Sunderland and Fox's statements in November and December of 1963 to Chalk as evidenced by contemporary writings demonstrated their knowledge of the above results; they stated that Tiquisate could produce 400 stems per acre, "all of this would produce beautifully in the new [Valery] banana", we can put together 20,000 or 30,000 acres of the "best banana land" and "You can have just as big a division as you want. There's all the land in the world there in Tiquisate . . ."

A letter from a United official, written in November, 1963 stated: Tiquisate was one the best locations in the world (proximity to market); its properties were "one of the most fertile banana areas in the world"; its total area of 30,372 acres could be planted with "a low-growing variety (i.e. wind-resistant) banana resistant to Panama disease" and "will produce more tons per acre than the tall Gros Michel banana"; and in the official's judgment the Tiquisate lands were capable of producing variety bananas in a number sufficient to enable the subsidiary to export 9,000,000 stems annually to the United States. That letter concluded: "At one time Tiquisate was one of our profitable divisions and could be an *even greater* banana producer again *with variety bananas*".

Plaintiff proved, based on contemporaneous documents, that defendant's officer, van Diepen, was a flim flam artist, whose statistics in support of his testimony that Tiquisate was their worst division, were, on simple, arithmetic analysis, plainly deceptive. The inescapable conclusion, by common sense reasoning, was that the Valery experiments at Tiquisate, on a per acre yield basis, were at least as satisfactory as in Honduras. Sunderland conceded that the Valery bananas with which United experimented at Tiquisate were actually boxed and shipped to Barrios. United never produced the results of those shipments which were the best evidence; instead its witnesses substituted their own 10-year old self-serving ipse dixit, which the Court erred as a matter of law in accepting (9a). In the Court of Appeals, defendant made no attempt to refute the overwhelming documentary evidence cited above and thus, implicitly, conceded its accuracy.

9. *The 1961 Miller Report.* The Miller Report was dated March 9, 1961, within 30 days after the denial of United's petition for rehearing in *Ripley;* it reflected the hostile attitude of United's management toward the *Ripley* decision. The authorization for the closing down of Tiquisate and selling off the properties took place on September 23, 1963 by the United and CAG boards, over 2½ years after the 1961 Miller Report. United's decision to proceed with the Valery in all of its divisions also took place in 1963. The facts about the Valery in 1963 are far more reliable as to United's motivations in 1963 than mere assumptions in 1961; for example, there were 1963 results on the Valery experimental plots at Tiquisate and none in 1961. The Miller Report was premised on shipments being made on a stem basis, whereas by 1963 the projection was to convert all United's divisions to boxing; thus the Miller Report was contrary to Sunderland's views that "boxing" has "a real significance for Tiquisate"; the unrebutted evidence established that boxing effectively reduced

IRCA's $130 tariff rate to the equivalent of $90 since more bananas per car could be hauled in boxes; experimental boxing for Tiquisate fruit for the entire year 1962 showed that Tiquisate fruit in boxes ranked third in price received for bananas in the United States eastern and gulf ports out of 8 United divisions. And no document offered by United established that Valerys could not be effectively shipped over IRCA in boxes. Moreover, Sunderland conceded that the figures from Miller's agricultural department "bear no relation whatever to any figures in the accounting department." The Miller Report also erroneously assumed shipments to the *east coast,* whereas best utilization, through Guatemala's advantage in water freight rates, is reflected by shipments to the *Gulf coast* ports of the United States. By adjusting the Miller Report's erroneous assumptions to the facts, plaintiffs demonstrated that the total landed cost per 100 lbs. for bananas from Tiquisate were practically the same for one of United's other major divisions, namely, Golfito. Moreover, the cost of converting 20,850 existing and rehabilitated acres at Tiquisate would only be $114 per acre or less than $2,500,000 (which also demonstrates that United misrepresented to Chalk when it advised him that it would cost $9,000,000 to convert to the Valery at Tiquisate); thus Tiquisate would have ranked first in "new funds per acre" instead of "fourth"; the lower original cost would have also reduced depreciation and the cost of production per 100 lbs. significantly. Within one month after receipt of the 1961 Miller Report, Sunderland stated "Tiquisate is *potentially one of our best divisions*". Fox in 1962 stated, in writing, that Tiquisate "fully boxed, shipping west"* and built up to 25,000 acres with new plantings in Cocos and Valery, "could *easily* become *one of the most profitable* [divisions] in the company."

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* Shipping west did not change the soil, blowdowns and other forces of nature.

In addition, there were two 1963 studies in evidence, one by Miller, which demonstrate that Tiquisate on a landed cost basis would in fact be competitive with United's other divisions and which negated the conclusions of the 1961 Miller Report. Thus, by the time of the decision to close Tiquisate in September of 1963, the March 9, 1961 Miller Report was ancient history yet Messrs. Sunderland and Fox testified that their only reliance in closing Tiquisate was on the 1961 Miller Report. In the Court of Appeals the defendant made no effort to even discuss or refute plaintiff's destructive analysis of the 1961 Miller Report.

The contemporaneous records of United in evidence demonstrate "that the [United] witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared", *Aluminum Co. of America, supra,* and that is adequate "to reverse a finding" *id,* 433.

10. *Landed Cost at United States Ports.* Defendants conceded below (DB 120) that the most important single factor in determining the best divisions in which to produce the Valery was landed cost at the ports in the United States, since that combined tropical cost and ocean freight; it represented the bottom line for each division. Landed cost included losses due to blowdowns, Panama disease, floods, railroad transportation in the tropics, water transportation, etc. Plaintiff relied on cost studies made by United which demonstrated that production of the Valery at Tiquistate would be competitive with United's other divisions; the District Court accepted plaintiff's landed cost figures and assumed that they "were accurate" (53a-54a). The Court of Appeals held (23a):

> "The district court, even though it assumed arguendo that the appellants cost estimates were accurate, nonetheless found that at the time they were received by Sunderland he had no reason to question them and his

reliance upon them was justified. There was no proof that they had been fabricated in order to provide a spurious basis for the action taken."

In fact, both lower courts erred as a matter of law in assuming that the burden of proof was upon the plaintiff* and in placing so much weight upon the 1961 Miller Report as the basis for United's September 1963 decision to abandon Tiquisate, especially when two 1963 reports in evidence completely refuted the conclusions in the 1961 Miller Report. A 1963 study by United (Roddy) showed that Tiquisate was competitive with United's other divisions; Tiquisate was practically tied for second out of six divisions.

Even though Sunderland ordered preparation of a 1963 Miller study, he never testified about it. Plaintiff put it in evidence after he testified. Defendant knew that the 1963 Miller Study was, in fact, contrived to reach a result and that if properly analyzed, it demonstrated that Tiquisate was indeed competitive with United's other divisions. For example, the *1963* Miller study assumed production of only 325 stems at Tiquisate at the very time that Miller was advising all his tropical mànagers to project variety production at 400 stems per acre. The 1963 Miller study was projecting a capital expenditure of $600 per acre at the very time Sunderland was being advised by his top financial man that the average cost of planting Valery bananas in existing farms (like Tiquisate) was only $300 per acre. Adjusting Miller's 1963 study by these two factors makes the tropical cost at port of export for Tiquisate practically the same as for Honduras (based on a 1963 study comparing Honduras with Ecuador). Therefore Sunderland obviously had "reason to doubt the [1961] Miller Report which showed Tiquisate to be the worst division", contra the District Court (54a).

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* *Aluminum Co. of America, supra*, 427.

Arguendo, even on the pessimistic assumption of 325 stems per acre and an investment of $600 per acre, the 1963 Miller study gives a landed cost at United States gulf ports of $2.38 per box (including ocean freight of 35¢) as contrasted with the 1963 forecast of $2.41 per box for Honduras. Thus, as contrasted with Honduras at $2.41 and Ecuador at $2.84 per box, Tisquisate was competitive. Most important, the historical cost record in producing Gros Michel bananas was lower at Tiquisate than Bocas and Bananera (both of which were converted to Valery), thereby demonstrating that historical costs were not decisive in closing divisions to produce the Valery. In fact, a United official stated with respect to the historical costs with a Gros Michel program that "The record is of *minor importance* in considering development of Bananera and Tiquisate divisions as producers of variety bananas." Also, the company had deliberately restricted such production at Tiquisate, knowing that costs would go up. Despite these facts, almost all of the evidence cited by the District Court to justify Tiquisate as the worst company division is based upon operating results with a Gros Michel program.

Clearly the District Court had a blindspot in accepting defendant's economic position. It is for such reasons that where there is a per se violation, the courts have refused to consider the mass of economic and agronomic data such as is involved in this case.

11. *The Carpenter Report.* This was a one-sided, post-determination statement, intended to disparage Tiquisate, prepared for Sunderland to submit to the directors in order to obtain their approval for the "elimination of the division." It compared actual costs of *Tiquisate* fruit, *Gros Michel,* for the years *1962* and *1963* (estimated), respectively, with projected production costs in *1966* and *1970* for the *Valery* bananas in *Honduras* and *Bocas.* That is comparing apples and oranges for the simple reason

that Tiquisate was being phased out so that production was down and its unit costs were high; its production of Gros Michel was based on, at most, 189 stems per acre, while the Honduras study is based on 400 stems per acre of Valery for future years when there was to be large scale production and unit cost was at its lowest. The above fallacious comparison was made after management had already decided to quit Tiquisate.

The covering letter states that the Carpenter report includes "future expectations of the Tiquisate Division in Guatemala" but the memorandum is totally silent on the subject. Proper analysis would have included a projected "Valery" cost for Tiquisate as it had for Bocas and Honduras.

Furthermore, the Carpenter report unfairly compared the operations of Tiquisate with United's best division, to wit, Armuelles. Armuelles had been consistently upgraded and production kept at a maximum, while Tiquisate had eliminated practically all of its planting program and was being phased out; as the exhibit states, "the reduced acreage and resulting production reduction results in higher overhead costs per unit."

Based on contemporaneous United documents, with the "so excellent" yields on Valery at Tiquisate, Sunderland's acknowledgment that Tiquisate would produce "beautifully" in the Valery, the favorable landed costs for the Valery from Tiquisate, the full conversion to boxing, and the practically zero blowdown experience of the Valery at Tiquisate, the only rational conclusion was that Tiquisate was one of the best United divisions to grow Valery. There were three *1963* reports by United, none of which were relied upon by the Courts below; instead, they reached out for an outdated, discredited *1961* report to support a 1963 decision. The findings below are infected with obvious and exceptional error.

12. *Tiquisate Was The Only Company-Owned Division Closed.* The three other United divisions that were scheduled, in 1963, for closing were 100% associate producer divisions.

13. *United Required IRCA To Discriminate In Its Rates And Practices In Favor Of United And Against Standard And Other Banana Producers.* Discrimination in the use of equipment started in the pre-statutory period and continued into the statutory period. The District Court in its opinion found (47a): "There is no doubt that CAG was given preferential treatment [on the allocation of banana cars] over Standard in the transportation of bananas from the west coast." But the District Court was so mechanical in adopting defendant's proposed findings as its own, that it adopted a defendants' finding (fdg. 57) totally inconsistent with its own opinion, stated above.

The Court of Appeals assumed "that discrimination did exist" but then, inconsistently, stated (26a):

> "In view of the chastening effect of the *Ripley* judgment and the terms of the consent decree, and the finding of the Court below that UF was in good faith attempting to live up to the terms of the decree, it cannot be argued reasonably that UF-CAG through coercive means or by insistence on contract terms was demanding preferential treatment."

General good faith in complying with a comprehensive consent decree does not negate specific discrimination. Moreover, the "good faith" was fictional. United had, contractually, during the pre-statutory period, required IRCA to discriminate on equipment in its favor; that contract provision continued to 1968 as found by the Court of Appeals and overlooked by the District Court. That equipment discrimination was so pervasive that it continued into the statutory period as a matter of ordinary business. As IRCA's President testified on cross-

examination (TR 339-40):

> "I used as the bible contracts insofar as I knew them, and they were explained to me and how I was to carry them out. As I understand it, when the Compania Agricola ordered bananas moved, we were to take care of those with preference.
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> • • • •
>
> "Now, when the Compania Agricola had daily cuts and large cuts, our power and cars in some instances became exhausted insofar as quantity is concerned, and, if the Standard Fruit Company ordered cars for cutting we naturally supplied the requests of Compania Agricola in prefererce to the Standard Fruit Company. If there was any power or cars left over, then they were given to Standard."
>
> Q. "Yes. But are you talking about the CAG banana cars or are you talking about other kinds of cars?
>
> A. "CAG locomotives, CAG banana cars, IRCA locomotives, IRCA banana cars, stock cars, box cars, whatever it was necessary to use at that time."

The Court of Appeals holding that "UF-CAG [was not] through coercive means or by insistence on contract terms . . . demanding preferential treatment" (26a) is obvious and exceptional error.

The Court of Appeals, apparently, followed the very reasoning that was rejected by this Court in *Thomsen* v. *Cayser,* 243 U.S. 66, 85, in which, with reference to the Sherman Act, it stated:

> "And we have since declared that it cannot *'be evaded by good motives,'* the law being 'its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a *supposed accommodation of its policy with the good intention* of the parties and, it may be, of some good results.'"

The Courts below misunderstood the significance of the equipment preference and requirement that IRCA carry all bananas tendered by CAG from western Guatemala. By that means, United had the power to, and did, regulate and control, Standard's or any other potential competitor's capacity to ship bananas from western Guatemala to Barrios. The issue was not what Standard *did* ship, but what it did *not* produce (and ship) because of United's *per se* violations. That issue does not turn on whether Standard asked for more cars. Standard at all times knew it was shipping at the pleasure of United and limited its plantings accordingly.

Moreover, the Court of Appeals failed to consider the undisputed proof that in 1959 United refused IRCA's request to return 100 banana cars to Guatemala for use in western Guatemala. That refusal further limited IRCA's capacity to carry bananas from western Guatemala during the recovery period.

As this Court stated, per Holmes, J., for a unanimous court, in *Swift & Co.* v. *U.S.,* 196 U.S. 375, 402, in finding §§ 1 and 2 Sherman Act violations:

> "It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation."

Our case is *a fortiori,* where the advantage went beyond a cost advantage; namely, serious service discriminations amounting to partial and outright refusals to serve.

United's control over its Guatemalan competitors through the equipment and other preferences exacted from IRCA was like the control exercised by the sugar refiners over the sugar beet farmers in *Mandeville Farms* v. *Sugar Co.,* 334 U.S. 219, where this Court stated (240):

> "The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleas-

> ure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry."

Likewise here, United dominated the entire Guatemalan banana industry.

The District Court held (fdg. 97) that "plaintiff has not shown that [Standard] expanded significantly in other locations rather than in Guatemala . . . [during the period it was operating in Guatemala]". The District Court overlooked plaintiff's showing that Standard expanded its production in the other Central American countries from 4,752,000 stems in 1959 to 6,795,000 stems in 1961 or by more than 2,000,000 stems.*

Moreover, in 1961 Standard exported less than 1,000,000 stems to the United States from western Guatemala and at the same time shipped 5,000,000 stems per year from neighboring Honduras. United's tropical cost at Tiquisate in 1961 (after paying the $130 rate) was lower than United's comparable cost in Honduras; it is fair to assume that Standard's costs were comparable (*Aluminum Co. of America, supra,* p. 416). Since the ocean freight from Honduras and Guatemala was the same, Standard's greater shipments from Honduras than from Guatemala must have been due to United's predatory rates and services over IRCA which necessarily restricted Standard's capacity to ship and thus its capacity to produce.

Despite the fact that Standard was further advanced than United in commercial production of a variety banana, in 1961 Standard had no incentive to rehabilitate its farms in Guatemala when it knew that its own shipments would be subject to CAG-United preclusion if United was so

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* And further expanded in 1962 to more than 8,000,000 stems.

minded. Furthermore, United still had its large block of IRCA stock and had until 1966 to dispose of it. Standard needed higher production in order to spread its fixed costs and thus lower its unit costs, but this could only be done with United's consent since that required IRCA to furnish it with a greater number of banana cars. Thus Standard's operation in Guatemala was always subject to the risk that United might cripple its shipments by preempting equipment at the critical times. Under such circumstances, Guatemala was not attractive for a large investment, the success of which was in the hands of United, Standard's dominant competitor. But for United's predatory preferences, it is a fair conclusion that Standard would have built up its capacity in western Guatemala to a point substantially higher than in fact occurred. Despite United's antitrust violations Standard shipped from western Guatemala 20% of the competitive imports from all countries (other than Ecuador) that entered the United States in the year 1960.

Where the source of supply and transportation to port of export were not controlled by United, independents did enter the market and expanded their banana production; for example, independents expanded their Ecuador exports to the United States from 12,000,000 stems in 1955 to 22,000,000 stems in 1964 despite the tremendous cost disadvantage of 150% due to the higher costs of ocean freight from Ecuador to the U.S. gulf ports as contrasted with Guatemala plus extra steaming time to market, and delays and tolls at the Panama Canal. The equipment preference was a *per se* violation and "in itself necessarily had an impact on [IRCA] and constituted an injury to its business" (*Zenith* v. *Hazeltine,* 395 U.S. 100, at 120).

Moreover, because of discrimination on the wharfage charge for bananas, as the District Court recognized, Standard's banana loading expense at Barrios was, at least, $46 per car, which it paid to IRCA, while United's

costs by using its own labor, which right was given to it by IRCA, was only $34.04 per car (44a)—reinforcing discouragement of Standard shipments.

As to United's exclusive use of the north side of IRCA's pier "where the water was several feet deeper and could accommodate larger vessels" (46a): obviously, as a United executive stated in considering shipping bananas from a different port, "There would be lost time of ships due to inability to obtain preferential berth and the cost of this cannot be calculated." Any potential shipper of Guatemala fruit would come to that same conclusion on learning of United's almost exclusive use of the north side and Standard's use of the apron on the south side. Standard itself was relegated to an inferior shipping position because the south side of the pier could not accommodate vessels of the size that could use the north side of the pier.

The Court of Appeals apparently concluded that the discrimination on the banana line haul rate and import tariffs through December 31, 1960, favoring United against independents, were predatory practices (17a), but held, apparently, that such violations of the antitrust laws in the pre-statutory period did not cause IRCA injury in the statutory period. We submit that this was error of law or an obvious and exceptional error of fact, which we discuss below.

Reasons For Granting The Writ

The Decision Below Is In Conflict With Basic Principles Laid Down By This Court.

A. *Wrongful shut-down of Tiquisate.*

If the decision below involving the dominant company in a basic American trade; namely the import of bananas, is not reversed, it will lower the standard applicable to

monoplies. This case goes to the heart of private enforcement of the antitrust laws, involving as it does, massive antitrust violations that resulted in immediate catastrophic losses leading to the destruction of IRCA'S whole railroad property in Guatemala. (The Courts below did not rule against plaintiff on standing to sue as to, or injury from, this violation.)

The Court of Appeals only gave lipservice to the settled rule that "a per se violation . . . is not saved by the allegations that the defendant's activities were reasonable in the circumstances . . . The reason for the per se approach is to spare the courts from an examination of the underlying justification of the *economic* or *other business motivation* which prompted certain pernicious practices that the courts have determined are always or 'per se' violative of section 1 of the Sherman Act. E.g., Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958)" (15a-16a). The per se rule applies to both sections 1 and 2.* Once plaintiff established United's per se violations; to wit, attempted price fixing and conduct to maintain monopoly in a relevant market, the courts below in accepting a "legitimate business reason" for the resulting abandonment were, in fact, accepting a prohibited defense that "defendant's activities were reasonable in the circumstances" (15a).

In a recognized text on antitrust law, von Kalinowski, Vol. 1 Antitrust Laws and Trade Regulation, § 6.02[3], pp. 99-100, states: "Since 1927, when the Supreme Court first described price-fixing as a restraint which was in itself unreasonable, the courts have consistently refused to permit even a showing that, in given circumstances, price-fixing might have some economic justification". Clearly, price fixing aimed at suppliers (IRCA) is as wrong as price fix-

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* See *Klor's* v. *Broadway-Hale Stores,* 359 U.S. 207, at 212; *Fashion Originators Guild* v. *Federal Trade Comm'n,* 312 U.S. 457, at 468; *U.S.* v. *Aluminum Co. of America,* 148 F2d 416, at 428 (C.A.2); *U.S.* v. *Trenton Potteries Co.,* 273 U.S. 392.

ing aimed at customers (*Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, at 235-6).

As held in *United States* v. *Aluminum Co. of America*, 148 F2d 416, 427-28 (C.A.2, Hand, L., J.) "all contracts fixing prices are *unconditionally* prohibited . . ." and "a monopoly necessarily involves an equal, or even greater, power to fix prices" than a conspiracy. "Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control that monopoly confers: they are really partial monopolies. * * * a monopoly is always an 'unreasonable restraint of trade.'" The Courts below failed to apply that legal standard to the facts here where the monopolist (and its wholly owned subsidiary) attempted to coerce plaintiff by the threat of abandonment, and when refused, carried it out. The District Court held, since the monopolist had 100% of the market "there was no longer any actual competitor to discriminate against" (54a) and it was therefore free to fix the price at the supplier level. This ignores the obvious—monopoly is also aimed at potential competition and at the victims of monopoly.

In *La Chapelle* v. *United Shoe Machinery Corp.*, 90 F. Supp. 721 (D. Mass.), the Court denied a motion to dismiss the complaint under § 4 of the Clayton Act and stated (723):

> "But the injury is equally great to one who wishes to sell his product in a market subject to monopolistic control and must sell to the monopolist as the only available buyer, again on the monopolist's terms, or not at all. Here the injury is the direct result of the monopolistic condition which has been created, and the injured seller may recover under § 15".

Here IRCA is the injured seller, it could only sell to monoplist United on United's terms, or not at all.

The abandonment of Tiquisate was designed to carry out United's threat* to IRCA that unless it reduced the judicially decreed fair rate of $130 per car, to an oppressive $90, United would shut down; after IRCA refused, United carried out its threat. United, the monopolist, was attempting to price fix at the supplier level, an abuse of monopoly power and a *per se violation* (*Mandeville, supra,* at 235-6).

In *United States* v. *Griffith,* 334 U.S. 100, 101, this Court held that a man with a monopoly of theatres in any one town is not permitted to use that "strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitiors." Likewise, United was using its "monopoly power" in Guatemala "as a trade weapon against" IRCA to beat down IRCA's fair rate. The Supreme Court in *Griffith* looked to the effect of joining a "threat to withhold" and a separate request for exclusive film rights in a different town and held: "he is using monopoly power to expand his empire." The facts in our case are *a fortiori* since the "threat to withhold" United's business in western Guatemala by way of abandonment was *expressly coupled* with United's request for a reduction in rates from IRCA (108).

Thus, here, as in *Griffith,* even if we assume *absence* of a specific intent to fix prices at the supplier level, to foreclose competitors from coming into Tiquisate or to maintain its monopoly, nonetheless United "is chargeable in legal contemplation with that purpose" since the end result of attempting to fix prices, foreclosure of competitors or maintaining its monopoly, is the "*necessary* and

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* The Courts overlooked United's concession (Doc. No. 73, TR 79, 3/7/73) that "United, incidentally, made no secret during the course of the [*Ripley*] litigation of its intention to cut down or go out of business . . . rather than continuing to pay the increase [$130 per car]."

direct consequence" of what United did; to wit, abandoning Tiquisate and selling off the land piecemeal to former employees and others for growing cotton (*id.*).

In *Griffith,* this Court stated (108):

> "The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect *whether one exhibitor makes the bargain* with the distributor or whether *two or more exhibitors lump together their buying power* as appellees did here. It is in either case a *misuse of monopoly power* under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed."

Thus this Court makes it clear that whether monopolist United, by itself, threatened abandonment to exact from IRCA a price lower than the fair price or whether it joined with another banana shipper, "It is in either case a *misuse of monopoly power* under the Sherman Act."

This Court in *U.S.* v. *Aluminum Co. of America, supra,* also stated (428): "a monopoly is always an 'unreasonable restraint of trade.'" Add that to the fact that § 1 violations are generally committed for the purpose of becoming a monopoly. Certainly then the legal standard of prohibitions applicable to a monopolist is stronger medicine that that applicable to a conspiracy under § 1. *A fortiori,* United, a monopolist, under § 2, could *not do* to IRCA, as a matter of law, what a conspiracy could *not do* under § 1.* Putting it affirmatively, if a conspiracy between United and Standard is not permitted to beat down IRCA's charge for transportation services in Guatemala under a threat, carried out, of abandonment, then United, a monopolist, could not do the same without violating § 2.

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* § 73 of the Wilson Tariff Act (15 U.S.C.A. § 8) was intended to make certain that the prohibitions of §§ 1 and 2 of the Sherman Act would apply with respect to United's imports.

In both cases, the business excuse or justification of better operating conditions in other divisions is immaterial. We may note, in this connection, that §§ 1 and 2 are intended to be construed together to avoid loopholes, as they, per the Supreme Court in *U.S.* v. *Amer. Tobacco Co.,* 221 U.S. 106, 181:

> "when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

Griffith also held (107): "For § 2 of the Act is aimed, *inter alia,* at the acquisition or *retention* of effective market control." United, in exercising its monopoly power here against IRCA, was attempting to retain effective market control over the U.S. banana import trade from Guatemala and Central America.

A monopolist's attempt to bargain down a price sought by a supplier of services by threatening to withdraw its business can be considered a monopolistic act as a matter of law. Such cases are *Mandeville, supra* (a conspiracy* of California sugar refiners to fix the prices they would *pay* for sugar beets grown in California); *Steiner* v. *20th Century Fox Film Corp.,* 232 F2d 190 (C.A.9), (a successful threat which gained a reduction in the rent from a supplier landlord; *Aluminum, supra* (Alcoa abused its monopoly power by charging its *customers* "unfairly *high* prices" while United abused its monopoly power by attempting to fix an unfairly *low* price for the services it would purchase from its *supplier,* IRCA); *Griffith, supra* (defendants used their monopoly power as exhibitors of films in towns in which they had a 100% monopoly to gain exclusive film rights in towns where other theatres

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* As demonstrated, at least the same legal standard applies to a conspiracy under § 1 and to a monopolist attempting to fix a price under § 2 of the Sherman Act.

were present and thus threatened their *supplier* of films in order to gain additional benefits, which is tantamount to a reduction in price; here, United did the same, with its 100% monopoly in Guatemala; it used its monopoly power to threaten IRCA in an attempt to get additional benefits, namely, a reduced price). A monopolist's price fixing is a per se violation of § 2 of the Act just as concerted price fixing is a per se violation of § 1 of the Act (see 1 von Kalinowski, Antitrust Laws & Trade Regulation, § 6.02[3] pp. 94-105).

Lorain Journal Co. v. *U.S.*, 342 U.S. 143, shows a monopolist's refusal to deal with its customers to restore monopoly power and eliminate competition. In *Eastman Kodak Co.* v. *Southern Materials Co.*, 273 U.S. 359, Kodak refused to *sell* to plaintiff at wholesale prices, while here, United, the monopolist, refused to *buy* from IRCA at "the *Ripley* judgment required rate of $130 per banana carload" (quoted part from Fdg. 177). Whether a monopolist is buying or selling when it fixes prices, it is in violation of Section 2.

United's *per se* antitrust violation, when CAG terminated its shipments over IRCA, was a fatal blow to IRCA's business and property. A plainer case of injury flowing from an antitrust violation would be hard to find.

Hence, the Courts below erred as a matter of law, in dismissing the complaint despite the *per se* violations. In addition, they committed glaring and exceptional error of fact in refusing to find that a significant reason for United's abandoning Tiquisate and terminating its shipments from western Guatemala was to maintain its monopoly in Guatemala and in Central America and to foreclose competitors from Tiquisate.*

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* *Amer. Tobacco Co.* v. *U.S.*, 328 U.S. 781, 809: Acts "in themselves wholly innocent", when "part of the sum of the acts which are relied upon to effectuate the conspiracy come within its prohibition."

By closing Tiquisate in the way it did, namely tearing up the rails and removing the irrigation equipment, and in not selling to Chalk and others, making certain that up to 9,000,000 stems of competitive fruit, annually, were not shipped from western Guatemala via IRCA to Barrios for export to the United States, United closed down Tiquisate with the distinct purpose of preventing competitors from producing there. United's closing was clearly in maintenance of its Guatemalan monopoly, which continued to the extent of 100% in eastern Guatemala and also in maintenance of its monopoly in Central America.

With over 70% of the Central America supply, United had monopoly power in Central America and the general intent to maintain that monopoly, as evidenced by the same "unlawful and exclusionary practices" by which "monopoly power was consciously acquired" in Guatemala (*U.S.* v. *Grinnell*, 384 U.S. 563, 576, and n.7).*

The *closing* of Tiquisate was "part of the plan," as found by the District Court (fdg. 139), whereby United

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* The undisputed evidence is that for the period 1954 through 1961, United shipped over 72% of the bananas from *western* Guatemala via IRCA to Barrios for shipment to the United States and practically 100% of the shipments for the period 1962 through 1964. Citing *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 167, defendant conceded below (DB63) that "the Courts have inferred monopoly power" where the share of the relevant markets was "in the range of 70%-100%." Therefore, defendant possessed "monopoly power in the relevant market", which is the first of two elements set forth in *Grinnell*, at 570-1, to prove monopolization; the second element of the offense, "the willful acquistion *or* maintenance of that [monopoly] power," is established by proof of "unlawful and exclusionary practices" by which "monopoly power was consciously acquired". Here such "unlawful and exclusionary" practices by United in Guatemala were established to the hilt; the Court of Appeals held that United "had clearly been guilty of predatory conduct in the past" (17a). Thus plaintiff proved, on uncontested findings and unchallenged facts, United's monopolization of western Guatemala and all of Guatemala, a clear violation of Section 2 of the Sherman Act.

"would limit its production to certain areas in Central America". It is undisputed that, thereafter, United did enhance its share of the Central America market. Success of United's plan to maintain its monopoly in Central America depended upon denial to competitors of access to Tiquisate's annual potential production of 9 million stems; especially in light of the fact that said plan was effectively implemented and 10 million stems of competitive fruit from Ecuador, annually, were eliminated from the U.S. market. Thus on the findings of fact by the District Court and the undisputed evidence, the effect of United's closing of Tiquisate was to maintain its monopoly in Central America.

The Court of Appeals confused the concept of relevant market and believed, erroneously, that since all bananas compete in the United States market, regardless of source, that was the only relevant market (13a-14a, n. 18).* Therefore, the Court failed to grasp plaintiff's position that Central America is a relevant market and Ecuador, because of the ocean freight differential, is a separate relevant market. For this reason, the Court never considered plaintiff's claim that a substantial purpose in United's abandonment of Tiquisate and failure to sell it as a going concern was to maintain its monopoly in Central America and to deal a severe blow to its competition in Ecuador. That the Court erred on the relevant market concept is well settled law (see *Mandeville, supra*, 236-7, *Woods Exploration & Proc. Co.* v. *Aluminum Co. of America*, 438 F2d 1286 (C.A. 5)).

It is illegal *per se* to use even a legal monopoly position, beyond the protected monopoly, "to foreclose competitors from any substantial market" *Intl Salt Co., Inc.* v. *U.S.*, 332 U.S. 392, 396; *Otter Tail* v. *U.S.*, 410 U.S.

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* It did assume that Guatemala was a relevant market for purposes of considering plaintiff's claims.

366, 377. *A fortiori,* here, where United used its *unlawful* monopoly position for such purposes.

United took the position that it had enough of a supply of bananas for the United States market and therefore that its phase-out of Tiquisate was to limit the total supply of bananas it decided to bring into the United States market. United's purpose was condemned by *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, which held that when a monopolist withdraws a "substantial part of the supply from a market", that is as "unlawful as an agreement to fix prices."

B. Injury From Wrongful Foreclosure Of Independent Traffic

Since United used IRCA as its instrument to commit per se violations of the antitrust laws; namely, restriction and foreclosure of shipments by United's competitors from western Guatemala over the IRCA railroad, IRCA has standing to sue and proved injury. The proof of injury was in showing (i) that Standard did in fact, expand in other Central American countries while shipping from western Guatemala and (ii) that other independents, despite a 150% ocean freight disadvantage, went to more distant sources of supply than western Guatemala to ship bananas.

Perma Mufflers v. *Intl. Parts Corp.,* 392 U.S. 134, sustained a § 4 action by the plaintiff who had unwillingly complied with a restrictive franchise agreement imposed on it by the defendant; Mr. Justice White, in his concurring opinion, explained the rationale for the decision as follows:

> "When those with market power and leverage persuade, coerce or influence others to cooperate in an illegal combination to their damage, allowing recovery to the latter is wholly consistent with the purpose of

§ 4, since it will deter those most likely to be responsible for organizing forbidden schemes." (145)

This is squarely applicable to the facts of our case and shows that a remedy for IRCA furthers the purpose of the antitrust laws and their enforcement.

Plaintiff proves his case where he "proves a loss, and a violation by defendant of the antitrust laws of such a nature as to be likely to cause that type of loss", *Continental Co.* v. *Union Carbide,* 370 U.S. 690, 697, 704; or proves damage plus "wrongful acts [which have a] tendency to injure plaintiffs' business", *Bigelow* v. *R.K.O. Pictures, Inc.,* 327 U.S. 251, 264-5.

Moreover, plaintiff need only prove "*some* damage" of which the violation is "*a* material cause." In *Zenith, supra,* at 114 n.9, this Court held that a plaintiff's

> "burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond the minimum point goes only to the amount and not the fact of damage. It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4."

These *per se* violations by defendants *"in [themselves] necessarily had an impact on [IRCA] and constituted an injury to its business," Zenith, supra,* at 120.

Since Standard's shipments were at the mercy of United's first use of the banana cars and locomotives, Standard as a matter of economic reality necessarily limited its production of bananas to a level which it knew it could ship given its inferior position in availability of equipment; to do otherwise would be economic suicide. In *Bigelow, supra,*

260, the Supreme Court stated:

> ". . . other things being equal, the establishment of the discriminatory release system was damaging to the petitioners, who were relegated by it to a playing position inferior to that of their competitors."

The Supreme Court in *Zenith* stated (123-4):

> "Trial and appellate courts alike must also observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a *partial or total exclusion from a market;* damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts."

Our case re Standard is one of "partial . . . exclusion" and other independents' non-shipments over IRCA, one of "total exclusion from a market."

In effect in *Zenith,* this Court was stating that there are certain times when per se violations necessarily cause injury to plaintiff's business. This is such a case. But we do not have to go that far. We proved what plaintiff in *Zenith* proved. In *Zenith* plaintiff did ***not*** have to prove who its customers would be in Canada, contra the Court's requirement here. It is unrefuted that bananas were being shipped from areas more costly than Guatemala-West and that IRCA's capability during the statutory recovery period was higher than the number of banana cars actually transported over it, thereby proving injury to IRCA's business or property; (the extent of injury had been reserved in a pretrial order for a further trial).

The Courts below erred as a matter of law in holding contra *Zenith,* that plaintiff had to show that specific *customers* had the "intention, preparedness and capacity" to ship more bananas than they were actually shipping where defendant's conduct previously restricted or stifled

such competitive shipments. Plaintiff Zenith did *not* show who its customers would be in Canada or that its Canadian customers had "the intention, preparedness and capacity" to purchase from Zenith, but for the antitrust violations.*

Furthermore, defendant's violations of the antitrust laws antedating February 16, 1961 (commencement of the recovery period), as well as subsequent violations, were a proximate cause of damages during the recovery period.** They precluded Standard from expanding its capacity in Guatemala; absent such violations, Standard's capacity in Guatemala would have been substantially greater than it was by February 16, 1961. At the time Standard made its decision not to rehabilitate its Guatemala plantations after the 1961 hurricane, United still had its stock interest in IRCA, still had its equipment and wharfage (rate and service) preferences over IRCA. Thus, but for United's violations, Standard's presence in Guatemala after the 1961 hurricane would have been subject to a situation devoid of discrimination. To judge Standard's decision on expansion in 1961 in the context of United's continuing violations, is to give United the benefit of its own wrongs.

C. IRCA Has Not Received A Fair Hearing Below.

On April 10, 1975 the New York Law Journal carried a news item to the effect that the Touro Law School had previously appointed Judge William Hughes Mulligan a member of its Board of Visitors and had appointed, as its dean, Maurice C. Kaplan, a director and a former member of the Executive Committee of United Brands Company (resigned April 7, 1975). During the briefing schedule in the Court of Appeals (almost 3 months before the oral

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* In that part of the first *Zenith* case, cited by the Court of Appeals (31a-32a), plaintiff Zenith never intended to enter the *English* market (as distinguished from the *Canadian* market).

** *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (the second *Zenith* case).

argument and before plaintiff learned from the court's notice that Judge Mulligan had been appointed to the Panel that would hear the appeal), the plaintiff, relying on that article and on Canon 2 of the Code of Judicial Conduct,* sent, through the Clerk of the Court of Appeals, a request that Judge Mulligan disqualify himself from hearing the appeal (87a-88a).** Judge Mulligan refused to do so, asserting that he had in fact resigned from the Board of Visitors two days before the date of the article (89a-90a). Plaintiff's counsel respectfully called Judge Mulligan's attention to the fact that the issue was not the factual accuracy of the article*** but what in the words of the Canon would "promote *public* confidence in the integrity and impartiality of the judiciary" (91a-92a). Judge Mulligan, nevertheless, sat and wrote the Panel's opinion.

Plaintiff submits that Judge Mulligan's refusal to disqualify himself from hearing the appeal was an abuse of discretion, contravening 28 U.S.C. § 455, as the publication in the New York Law Journal, never retracted, put him in a relation to or connection with the defendant, making it improper for him to sit on the appeal.**** Since the Court of Appeals does not have authority to control an appellate judge's determination under § 455, this is the plaintiff's first opportunity to seek a review of Judge Mulligan's refusal to disqualify himself.

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* Canon 2 ¶ A, provides in pertinent part that "A Judge . . . should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

** All the correspondence relating to this subject is reproduced in Appendix D, hereto, 87a-99a.

*** The University of the State of New York, The State Education Department, still had Judge Mulligan listed as a member of the Board of Vistors of Touro Law School as of May 13, 1975 (93a-95a, 99a).

**** Section 455 provides in pertinent part that the judge shall disqualify himself in any case in which he "is so related to or connected with any party . . . as to render it improper, in his opinion, for him to sit on the . . . appeal . . .".

Moreover, plaintiff believes it did not have a proper review by the Court of Appeals of the factual issues in this case because of the way in which the District Court made its findings. The findings of fact, while large in number, were a distortion of the entire record, since such findings were drawn almost exclusively from those submitted by defendant and as such were an advocate's brief rather than judicial findings. Of the 245 numbered findings of fact, the District Court adopted verbatim 172 findings submitted by defendant* and slightly modified another 35 findings proposed by defendant. The District Court made no attempt to make findings with respect to plaintiff's theory of the case even though many of the facts were uncontested. Since the Court of Appeals affirmed almost all the District Court's findings, its opinion suffers from the same infirmities.

The learned Courts below overlooked most of the significant facts relating to defendant's antitrust violations. Therefore, their findings of fact were totally inadequate and only presented a fraction of the total case. Despite the affirmance of the findings of fact, plaintiff has demonstrated "very obvious and exceptional error", as required by *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275.

The Courts below relied heavily on self-serving testimony by biased witnesses who participated in the wrongs, and whose 10-year old alleged "recollections" were refuted by contemporaneous documents. The District Court found, based almost entirely on such incredible testimony and a superseded document, that Tiquisate was the worst division in which to grow the Valery banana. In net effect the

* District Court Judge Murray Gurfein was appointed to and assumed his duties as a Judge of the Court of Appeals for the Second Circuit in September 1974, near the close of the briefing schedule in the District Court; his opinion and findings of fact were rendered on January 29, 1975. The learned Judge's heavy work load in the Court of Appeals may help explain his non-critical approach to the findings.

finding was that United's witnesses were lying in their 1963 contemporaneous documents when they had no motive to lie but were telling the truth 10 years later at the trial when they did have a motive to lie. That was obvious error.

The finding by the District Court that Sunderland and his fellow executives were "sincere"* in their testimony is obvious and exceptional error since they were all shown to be monopolists who had gouged the American public. Besides the dumping violation described above, United monopolized the western United States. In 1959, it had practically a 100% monopoly, in 1960—94% and in 1963-1964—81% of that market. Based on its 94% share of the western division market, United (Messrs. Sunderland, et al.) in 1960, fixed prices and received 30% more on the average price for bananas in Los Angeles than in New York even though the ocean freight cost was practically the same. That meant Sunderland, Fox, Mason and van Diepen, United's only witnesses at the trial, participated in United's behalf as co-conspirators, in fixing prices in 1960 in the western division and extorting over $8,000,000 from United States consumers.** The District Court and Court of Appeals apparently overlooked the monopolization of western U.S., the price fixing, the preemptive purchases in Eucador and the "dumping" in finding United's witnesses "sincere". In *U.S.* v. *Aluminum Co. of America, supra,* at 432 (C.A.2, L. Hand, J.) the Court stated: "no monopolist monopolizes unconscious of what he is doing." Accordingly, United's monopoly in western United States was relevant and material on the issue of the "sincerity" of United's witnesses.

* In 1963 United was indicted for dumping bananas in the western United States market; United pleaded *nolo contendere.*

** That fleecing of the American public continued in 1963-1964, when United's average price in the western division was over 20% higher than in the eastern division.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

SIDNEY BENDER
Attorney for Petitioner

(60004)

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 192, 193—September Term, 1975.

(Argued December 2, 1975 Decided March 4, 1976.)

Docket Nos. 75-7165, 75-7166

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—against—

UNITED BRANDS COMPANY,

Defendant-Appellee.

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA,

Plaintiff-Appellant,

—against—

COMPANIA AGRICOLA DE GUATEMALA,

Defendant-Appellee.

Before:

LUMBARD, FRIENDLY and MULLIGAN,
Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York, Hon. Murray

I. Gurfein, *J.*, dismissing plaintiff's antitrust and contract claims.

Affirmed.

SIDNEY BENDER, New York, New York, *for Plaintiff-Appellant.*

DAVID KLINGSBERG, New York, New York (Kaye, Scholer, Fierman, Hays & Handler, New York, New York, Milton Handler, Fredric W. Yerman, William Thomashower, of Counsel), *for Defendants-Appellees.*

MULLIGAN, *Circuit Judge:*

This action claiming various antitrust violations and breach of contract was brought by plaintiff International Railways of Central America (IRCA) against United Brands Co., successor in interest to United Fruit Co. (UF),[1] and its wholly-owned subsidiary Compania Agricola de Guatemala (CAG), by the filing of a complaint and summons on February 16, 1965.[2] Essentially it appears that plaintiff IRCA was dominated for many years by its controlling stockholder UF. (UF, however, sold virtually all of its IRCA stock in January 1962, pursuant to a 1958 consent decree which terminated a civil antitrust complaint brought by the federal government. See 373 F.2d at 411. The decree will be discussed in more detail *infra*). UF was

1 We will generally refer to the company as UF, its historical name; this is consistent with prior published opinions in this case.

2 Since that time the case has been the subject of one court of appeals decision, 373 F.2d 408 (2d Cir.), cert. denied, 387 U.S. 921 (1967), as well as the two opinions below, 358 F. Supp. 1363 (S.D.N.Y. 1973) and an as-yet unreported opinion, —— F. Supp. ——, 65 Civ. 479-72 Civ. 649 (S.D.N.Y., Jan. 29, 1975). A fuller historical statement of the facts will be found in those opinions.

and is in the business of importing bananas into the United States; its subsidiary CAG owned and operated banana plantations in western Guatemala, in an area called Tiquisate. IRCA had operated since the early part of this century the only railroad of any significance in Guatemala. Its main line ran from Puerto Barrios on the Atlantic Coast of Guatemala across the isthmus to the Pacific Coast. While all of plaintiff's assets were seized by the Guatemalan government in 1969 for alleged default on a government loan, the corporate entity remains and is the present plaintiff.

Of plaintiff's antitrust claims against UF, three survive (numbered as they were in the lower court): *First*, that UF, by requiring IRCA to discriminate in its rates and practices (such as preferential use of railroad equipment), prevented other prospective banana shippers from using IRCA's rail facilities from February 16, 1961 to December 31, 1961,[3] thus causing IRCA to lose the profits it would have gained thereby, in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; *Third*, that UF restricted its own banana shipments over IRCA's lines from February 16, 1961 until 1964, and disposed of its Tiquisate plantations in such a way as to prevent others from cultivating bananas on the same land, thus causing IRCA to lose profits, in violation of sections 1 and 2 of the Sherman Act; *Sixth*, that UF's acquisition of a controlling interest in IRCA had the effect of probably lessening competition in and tending to monopolize the importa-

3 The earlier Second Circuit decision, note 2 *supra*, held that all antitrust claims arising prior to February 16, 1961, four years prior to the filing of the complaint, were barred by the applicable statute of limitations, 15 U.S.C. § 15b. This holding is now the law of the case. Apparently plaintiff chose December 31, 1961 as the other cut-off date for its first claim because, as noted *supra*, in January 1962 UF divested itself of its IRCA stock and thus lost its earlier control of IRCA.

tion of bananas into the United States in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.

The *Fifth* claim against UF, and the only claim against CAG, was for breach by CAG of certain 1948 contracts by failing to maintain a substantial volume of banana shipments from western Guatemala on IRCA's lines.[4]

I. Prior Proceedings

In 1949 dissatisfied minority stockholders of IRCA instituted a derivative suit against UF in the Supreme Court of the State of New York, alleging that UF, as controlling shareholder of IRCA, breached its fiduciary duty to the latter by using its dominant position to procure from IRCA unfairly low rates for its banana shipments. An award of damages (totalling, with interest, some $8.5 million) to IRCA and a mandated increase in freight rates between the parties was eventually affirmed by the New York Court of Appeals, *Ripley* v. *IRCA*, 8 N.Y.2d 430, 209 N.Y.S.2d 289, 171 N.E.2d 443 (1960). Approximately four years later the instant antitrust and contract action was commenced, with plaintiff retaining the same attorneys who had won success in *Ripley*.

In 1966 UF moved to dismiss the instant suit on the theory that IRCA's claims were barred by the prohibition against splitting causes of action between *Ripley* and the instant suit, and by the statute of limitations. A granting of the motion on the first ground (254 F. Supp. 233 (S.D. N.Y. 1966)) was reversed, 373 F.2d 408 (2d Cir. 1967). However, this court agreed with the district court that the statute of limitations barred claims for alleged antitrust violations committed before February 16, 1961.

Thereafter, UF made a motion for summary judgment in the trial court, on two grounds: one, that the plaintiff

4 The Second and Fourth claims against UF were withdrawn.

lacked standing to sue under the antitrust laws, and two, that the contract claim had to be dismissed because there was neither an express nor an implied obligation on CAG's part to ship any particular volume of bananas on plaintiff's lines. By an opinion reported at 358 F. Supp. 1363 (S.D.N.Y. 1973), partial summary judgment was granted dismissing the contract claim insofar as it sought damages for breaches committed after December 31, 1962[5] and before January 1, 1961 against UF, and after December 31, 1962 and before October 9, 1962[6] against CAG. In addition, partial summary judgment dismissing the antitrust claims for acts committed prior to February 16, 1961 (the cut-off statute of limitations date already found by the circuit court) was also granted. Id. at 1378. The motion for summary judgment was denied in all other respects. Id.

A trial without a jury was then held before District Court Judge Murray I. Gurfein on the issues of liability. The trial proceedings consumed fourteen days, with both sides producing a great deal of documentary and testimonial evidence; seven witnesses were heard, and their testimony consumed 2045 pages of transcript. On January 29, 1975, Judge Gurfein, now a Circuit Court judge sitting by designation, filed an extensive and comprehen-

5 The contract expiration date found by the court. 358 F. Supp. at 1374-76.

6 The January 1, 1961 date results from the fact that the judgment in *Ripley*, as supplemented, covered the period through December 31, 1960; the alleged failure to ship could have been recovered as an item of damage in that action. 358 F. Supp. at 1377. October 9, 1962 is the date six years prior to the commencement of another action by IRCA against CAG in the Massachusetts federal district court, later dismissed so that CAG could be sued along with UF in the Southern District of New York. The parties stipulated this date to be determinative of the statute of limitations as regards the contract claims against CAG. Id. at 1377 n.7.

sive opinion, to which was appended 245 findings of fact (some of them from the prior *Ripley* litigation) and twenty-one conclusions of law, dismissing the complaint and finding for defendants in all respects. From this opinion, and Judge Gurfein's earlier partial dismissal of IRCA's contract claim, the plaintiff appeals. For the reasons that follow, we affirm.

II. Facts

Since IRCA on appeal raises numerous factual as well as legal issues, it will be necessary to recite the facts in some detail.

The relationship between IRCA and UF extends back practically to the turn of the century. By the late twenties, UF, through stock control, dominated the affairs of IRCA. By 1936, UF was able to control the election of IRCA's nine directors, although for many years the extent of UF's dominance was concealed.

UF desired to exercise its control over IRCA to insure for itself low freight rates and special services for the shipment of its fruit, while at the same time denying them to its competitors. For example, on banana shipments from Western Guatemala, UF paid IRCA only $60 per railroad car, performing wharfage services and loading at Port Barrios with its own labor, whereas its competitors paid $130 per car, and an additional $72 to IRCA for wharfage and loading, upon which IRCA made a profit. This disparity in freight rates was provided in a 1933 contract between UF and IRCA. In 1936, these rates were reaffirmed, and additional provisions added; for example, CAG agreed to buy new locomotives and cars for use on IRCA tracks and agreed not to build a port on Guatemala's west coast to insure that the fruit produced at Tiquisate would be carried on IRCA's lines

to east coast ports. In separate agreements, CAG was given the right to operate its banana cars over IRCA's lines, and IRCA agreed to operate CAG's trains and to maintain CAG's rolling stock.

In 1948 CAG and IRCA entered into new agreements, which in essence reaffirmed and extended the 1936 contracts. The main contract was to continue until December 31, 1962, and the supplemental trackage and operating agreements until five years thereafter.

As we have noted, the *Ripley* litigation commenced in state court in 1949, and the decree there fixed the subsequent rate for future banana shipments by UF over IRCA at $130 per car, the same rate then charged by IRCA to UF's competitors. Furthermore, as noted, UF was forced by the 1958 consent decree to sell its stock holdings in IRCA by 1966 and in fact in January 1962 sold all but one hundred shares. In fact, it was found below that the IRCA board of directors was independent of UF by February 16, 1961, the statutory cut-off date. At the May 1961 stockholders' meeting, UF did not vote its stock. Furthermore, it was found below that there had been at least three independent directors since 1959. In addition, the consent decree expressly prohibited contracts between UF and IRCA that would require IRCA to discriminate against other shippers.[7]

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7 The pertinent portion of the consent decree (¶ VI (A)(9)-(10)) reads as follows:

> (A) United is enjoined and restrained from, directly or indirectly:
>
> . . . .
>
> (9) Entering into, adhering to or maintaining any agreement, contract or arrangement with any common carrier by rail or water in the Western Hemisphere which provides that the common carrier will not accord to competitors of United terms, privileges and treatment in the transportation of bananas for sale in the United States or destined for sale in the United States

The court below also found as a fact that UF-CAG at all material times exported most or all of the bananas sent to the United States from Guatemala. However, what once was a profitable banana business began to deteriorate during the 1950's. UF's net earnings from its banana operations declined from $58.6 million per year in 1950 to $7.2 million in 1959. The Tiquisate plantation became plagued by Panama disease which rendered the area unsuitable for the cultivation of the more common type of banana (Gros Michel or Cocos type), and in addition was subject to excessive "blowdowns," or storms, which destroyed vast areas of plantings. As a consequence, UF's management was forced to take some sort of affirmative action.

As the lower court found, "[b]efore and after February 16, 1961 United officials informed IRCA that unless the *Ripley* judgment required rate of $130 per banana carload was reduced to $90, the Tiquisate operations might have to be liquidated. IRCA refused to reduce the $130 *Ripley*-decreed rate." [8] Furthermore, the main IRCA-CAG agreement, which included the scheduling of rates, was to expire on December 31, 1962, so that the freight rates were due for renegotiation at that time. However, IRCA took the position that the main contract did not expire until the end of 1967, and refused to consider the renegotiation of rates. (IRCA's interpretation of the contract expiration

proportionately equal to those accorded by the carrier to United;

(10) Tortiously interfering with the performance of, or intentionally inducing the breach of, any contract related to any phase of the banana business between any of United's actual or potential competitors in the banana business and any grower, transporter, seller or purchaser of bananas, where such interference or breach affects the foreign or domestic commerce of the United States.

8 Findings of Fact 177 and 178 in the court below.

date was expressly rejected by the court below, 358 F. Supp. at 1374-76, which found the main agreement, by its very terms, to expire at the end of 1962, not 1967.) Thereafter, UF-CAG decided to liquidate the Tiquisate properties.

It was found as a fact below[9] that UF, starting in 1961, began a company-wide program to sell or otherwise dispose of many unproductive land holdings; eventually, properties in Ecuador, Costa Rica, Honduras, Guatemala, and other countries were liquidated. With respect to Guatemala, it was found that after the Communist takeover of that country in the early fifties, the political climate was at best inhospitable. Besides widespread riots and labor strife,[10] the government generally discouraged the growing of bananas in western Guatemala, preferring instead that cotton be grown there.[11]

In an attempt to cope with the ravages of Panama disease and "blowdowns" on the more conventional strains of bananas, UF, in the early sixties, successfully developed a new type of banana, the Valery. It was found below that the Valery, besides being resistant to the disease, and less susceptible to tropical windstorms because of its shorter height, also required less land for cultivation, thus rendering some of UF's land holdings superfluous. On the other hand, its thinner skin made it less able to withstand long railroad hauls, such as the trek over the mountains from Tiquisate to Port Barrios.

A sharp disagreement arose between the parties as to whether Tiquisate was a logical area for UF to abandon

9 Finding of Fact 136.

10 For example, CAG's labor relations man in Tiquisate was fatally shot in May of 1961 (Finding of Fact 162(e)). And see Findings of Fact 160-63.

11 Finding of Fact 220.

when the decision to put the Valery into production was reached. Even on this appeal the parties buttress their contrary positions with masses of agronomic data. However, the lower court credited defendants' testimony and documentary evidence[12] which demonstrated that UF in good faith decided to close down Tiquisate for legitimate business reasons.[13]

Plaintiff further alleged that UF, in closing down Tiquisate, did so in such a way as to forestall its competition from moving in. Besides the unfavorable agronomic factors already mentioned, the only other banana producer of note in Guatemala, Standard Fruit, by this time had already closed down its Guatemalan plantation as the result of a hurricane striking its west coast plantations in November 1961. The court below found that UF's decision to "phase out" Tiquisate was not taken until September 1962 at the earliest.[14]

While a few leases granted by UF on Tiquisate land did contain restrictive covenants prohibiting the use of the land for banana growing, the lower court found this not to be a general policy on UF's part.[15] As to whether UF made any good faith efforts to sell the land as a going

12 Including a contemporaneous study, the "Miller Report," prepared for the company, which compared the potential of several of UF's divisions for Valery production, analyzing such factors as costs, wind damage, political climate, etc.; it concluded that Tiquisate was relatively the worst division of those studied, and that the next-to-worst was UF's facility in eastern Guatemala, called Bananera. The report concluded: "On the basis of the above, it is obvious that the future of the two Guatemala divisions for the production of varieties is extremely doubtful and they should get top priority in our plans for reduction of costs and disposal of properties."

13 We note in passing that at the trial below, plaintiff offered no opposing expert testimony of its own.

14 Finding of Fact 198; cf. Finding of Fact 184.

15 Findings of Fact 196, 212.

concern for purposes of banana cultivation, the lower court first observed that the buyer's market was small, for the agronomic, economic, and political reasons already noted. In addition, UF could not sell land to its previous Guatemalan competitor, Standard Fruit (assuming the latter would even want to go back to western Guatemala after its own plantations there were destroyed by the 1961 hurricane), because such a sale was forbidden by the terms of the 1958 antitrust consent decree. UF did approach others of its competitors, but they evinced lack of interest for various reasons. The deal which, in plaintiff's estimation, came closest to fruition was one to sell the land to O. Roy Chalk, chairman of IRCA's board from 1963 to 1966. However, the lower court found Chalk to have been "slippery" in the sales negotiations, and that he never in fact put forth a firm or reasonable offer. In short, the court found that "[p]laintiff has failed to prove that Chalk had the intent, preparedness and capacity to purchase the Tiquisate division." [16] As a consequence, the deal foundered, and on January 9, 1964 the UF board decided to terminate negotiations with Chalk. The lower court stressed that "[t]hroughout the negotiation, United had made a good faith effort to sell Tiquisate to Chalk," and that this was factually substantiated in numerous ways.[17]

The Tiquisate banana operation was closed down by August, 1964, and the land sold by CAG.

III. The Antitrust Claims

(a)(1) The Third Claim—The Law

The appellant argues that even if UF had legitimate business reasons to abandon the Tiquisate operation, as

16 Finding of Fact 232.

17 Finding of Fact 245.

was found below, the closing nonetheless violated both sections 1 and 2 of the Sherman Act. The violation of section 2 is premised on the theory that UF abused its monopoly power by refusing to deal with IRCA. Appellant relies upon cases such as *Lorain Journal Co.* v. *United States,* 342 U.S. 143 (1951) and *Eastman Kodak Co.* v. *Southern Photo Materials Co.,* 273 U.S. 359 (1927) which do stand for the proposition that where a single trader refuses to deal in order to enhance its monopoly position, a section 2 violation may be found. Appellant further relies upon Judge Learned Hand's comment in *United States* v. *Aluminum Company of America* (Alcoa), 148 F.2d 416, 432 (2d Cir. 1945) that "no monopolist monopolizes unconscious of what he is doing." From these cases appellant concludes that UF, no matter how legitimate its reasons for giving up the Tiquisate operation, was in violation of section 2 of the Sherman Act.

While we agree that a specific intent to monopolize need only be found in a case where a defendant is charged with a conspiracy or attempt to monopolize, *United States* v. *Griffith,* 334 U.S. 100, 105 (1948); *United States* v. *Aluminum Company of America, supra,* 148 F.2d at 431-32, it does not follow that any act of the alleged monopolist irrespective of intent constitutes a section 2 violation. Judge Hand's comment was that no monopolist *"monopolizes"* unconscious of what he is doing. The action alleged to offend section 2 must be one which is monopolistic. The Supreme Court has clearly indicated that in order to establish such a section 2 violation, the plaintiff must establish that the defendant had a deliberate or willful purpose to exercise monopoly power. *United States* v. *Grinnell Corp.,* 384 U.S. 563, 570-71 (1966); *American Tobacco Co.* v. *United States,* 328 U.S. 781, 809 (1946). Monopoly power is well understood as "'the power to control prices or exclude competition.'" *United States*

v. *Grinnell Corp., supra,* 384 U.S. at 571; *United States* v. *E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 391 (1956).

In view of these cases construing section 2 of the Sherman Act we cannot sensibly characterize the closing of Tiquisate as a use of monopoly power if we accept the findings of fact made below. While the court below assumed arguendo that "UF by the 1960's was a monopoly or close to a monopoly," —— F. Supp. at ——, the court further found that IRCA, which had the only railroad providing a viable system to transport UF-CAG bananas from the west coast to Barrios was "itself a monopoly, armed with a judicial decree on rates." —— F. Supp. at ——. It cannot be reasonably argued, as appellant does, that "as a matter of law" UF's abandonment of Tiquisate constituted a violation of section 2. The rebuff of IRCA to UF's request to reduce rates and its refusal to deal with UF except on its own terms, albeit judicially sanctioned ones, is indicative of its own strength and independence. UF in fact had no reasonable business alternative but to abandon an unprofitable and uncomfortable operation. This cannot possibly be characterized as an act of monopolization, which is the exercise of a power to fix prices or to exclude competition. Appellant's proposition boils down to the argument that a defendant which has a monopolistic position can never abandon an unprofitable operation but must continue to lose money because shutting down might involve a loss of profit for the supplier of a service. No authority for this position has been advanced or discovered.

We have assumed, as the court below did arguendo, that UF was at this point in the possession of monopoly power. This is a dubious proposition at best.[18] After the *Ripley*

18 In assuming monopoly power, Judge Gurfein considered the relevant market to be the "importation of bananas into the United States solely from Guatemala." Appellee argues persuasively that bananas imported

decree UF had no ability to coerce IRCA into submission to lower freight rates. Whatever teeth the "monopolist" had were drawn by the 1958 consent decree which mandated the divestiture of its IRCA stock. Its net earnings from banana operations, as we have pointed out, declined from $58.6 million in 1950 to $7.2 million in 1959. Blowdowns, Panama disease and political upheaval had all taken a toll. Its inability to obtain a lower rate from IRCA itself demonstrates that UF was no longer able to exert monopolistic pressure. We cannot accept the position that the Tiquisate abandonment, irrespective of UF's intent, constitutes a section 2 violation.

With respect to section 1, appellant argues that a joint boycott or refusal to deal is a per se violation of section 1 of the Sherman Act. This of course has been an accepted tenet of antitrust law since *Fashion Originators' Guild of America* v. *Federal Trade Commission*, 312 U.S. 457 (1941) (*FOGA*). See *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press* v. *United States*, 326 U.S. 1 (1945). The initial question is whether or not the conspiracy or combination alleged here to be between UF and its wholly-owned subsidiary, CAG, is prohibited by section 1 of the Sherman Act. Appellant relies upon *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) for authority that the so-called "intracorporate conspiracy" doctrine will support a

from Central and South America and the Caribbean constitute the relevant market since they compete in the United States market with Guatemalan bananas. *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Moreover, appellee continues, there was no proof whatsoever of monopoly power, i.e., the ability to fix prices or exclude competition, in that market. Rather than remand for further proof we will assume the relevant market determined by the court below. Since it found no monopolistic intention or action, there was no section 2 abuse in any event.

conspiracy or agreement between a parent and its wholly-owned subsidiary. The appellees urge with equal vigor that *Kiefer-Stewart* involved a price-fixing scheme between two commonly owned enterprises which were held out to be and were in fact competitors, that CAG was here in fact the only customer of IRCA, and that UF only dealt with IRCA through its subsidiary, and therefore *Kiefer-Stewart* cannot be sensibly extended to cover what in essence is a unilateral action. See *Beckman* v. *Walter Kidde & Co.*, 316 F. Supp. 1321, 1325-26 (E.D.N.Y. 1970), aff'd per curiam, 451 F.2d 593 (2d Cir. 1971), cert. denied, 408 U.S. 922 (1972). Tempting though it is to become enmeshed in this thicket,[19] we need not do so and instead will assume arguendo, as the lower court did, that an intracorporate conspiracy did exist. However, the court below found no section 1 violation since the closing of Tiquisate was compelled by legitimate business considerations. Once again however appellant argues that *FOGA* stands for the proposition that a joint boycott is a per se violation and is not saved by allegations that the defendant's activities were reasonable in the circumstances.

It is basic again in antitrust law that violations such as horizontal price-fixing and group boycotts are illegal per se and are not saved by protestations that the motivation of the defendants was decent or morally justifiable. The reason for the per se approach is to spare the courts from an examination of the underlying justification of the

19 See, e.g., *Joseph E. Seagram and Sons, Inc.* v. *Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71, 81-82 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970) (no violation of group boycott per se rule when manufacturer and its subsidiary agree to transfer their business from one wholesaler to another, at least absent a forbidden anti-competitive or monopolistic objective); M. Handler, H. Blake, R. Pitofsky, and H. Goldschmid, Cases and Materials on Trade Regulation 473-75 (1975) (note on intracorporate conspiracy); Willis and Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U. L. Rev. 20 (1968).

economic or other business motivation which prompted certain pernicious practices that the courts have determined are always or "per se" violative of section 1 of the Sherman Act. E.g., *Northern Pacific Ry.* v. *United States,* 356 U.S. 1, 5 (1958). Thus in *FOGA,* upon which appellant places principal reliance, the F.T.C. was able to establish that the defendants, manufacturers of textiles and designers of original and exclusive women's dresses, had deliberately joined together to refuse to sell to those retailers who carried the wares of so-called "style pirates" who allegedly were copying defendants' original fabrics and designs and undercutting the prices of the defendants. The court found:

> [T]he aim of petitioners' combination was the intentional destruction of one type of manufacture and sale which competed with [defendant] Guild members. The purpose and object of the combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.

312 U.S. at 467-68. Having found the deliberate and intentional refusal to sell with the purpose and object of eliminating competition, the Court rejected the argument that the motivation of the Guild members was to protect themselves against "the devastating evils growing from the pirating of original designs . . . ." The appellant here however has failed to establish the deliberate and intentional combination to refuse to deal. The court below has found, as we have indicated, that the abandonment of Tiquisate was dictated by legitimate business considerations. Once having made that decision UF and CAG had no reason further to use IRCA transportation. They were out of business. Appellant has not cited nor have we found any case that has held or even suggested that companies

which abandon a business are guilty of Sherman Act violations simply because as a result of their decision a vendor or supplier or customer will lose trade. This would indeed be an intolerable application of the Sherman Act. Cases such as *FOGA, Klor's,* and *United States* v. *Parke Davis & Co.,* 362 U.S. 29 (1960), relied upon by appellant, all involve joint refusals to deal by viable business entities which deliberately and intentionally refused to deal with a trader although otherwise able. In sum, on the findings below there was no such joint boycott and therefore the plaintiff cannot claim any benefits of the per se rule.

(a)(2) The Third Claim—The Facts

We conclude therefore that appellant's third claim can only succeed if it can establish that the findings of fact below are clearly erroneous. Under Rule 52(a) of the Federal Rules of Civil Procedure findings of fact in actions tried without a jury "shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Moreover, in an antitrust case with a vast record where much depends upon the motive and intent of the defendants, the credibility of their live witnesses below is particularly significant. E.g., *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 332 (1952). Appellant's thesis has been and remains that UF, which had clearly been guilty of predatory conduct in the past, had, since February 16, 1961 (the statutory damage cutoff date) deliberately cut down its traffic over IRCA and eventually abandoned Tiquisate in retaliation for IRCA's refusal to lower freight rates, and so disposed of its property that other banana growers could not utilize it and become IRCA freight customers. Since IRCA was not a competitor of UF or CAG (as the court below noted), appellant was in the unenviable position of attempting to

prove that the defendants deliberately sabotaged their own viable enterprise solely to destroy IRCA without any apparent business justification but reprisal. The position is not realistic and in fact we find nothing in the record to support it. On the contrary, the findings of fact below are squarely contrary and we find no reason at all to characterize them as clearly erroneous.

In addition to the facts we have noted before, Judge Gurfein's pertinent findings and conclusions are set forth in the margin.[20] While the appellant argues that Thomas Sunderland, former president of UF, had displayed animosity to IRCA and that his strategy was to abandon Tiquisate unless a rate reduction was achieved, Judge Gurfein below found instead that he was "impressed with the sincerity of" Mr. Sunderland and the other UF witnesses. (Three other UF witnesses testified that the land at Tiquisate was no longer needed in light of the development of the Valery banana.) Judge Gurfein continued: "They testified lucidly about the difficult problems they were facing in the 1959-1964 periods, difficulties which arose independently of the *Ripley* lawsuit. In general, I credit their testi-

20 "(Third Claim) The closing of Tiquisate was not an act in maintenance of monopoly power, but was part of a company-wide policy dictated by legitimate business considerations to shift United's production from Gros Michel to Valery, to close down those divisions less suited for the production of Valery because it required less land, and to transfer United's Guatemalan production from the West Coast to the East Coast which was closer to port and where abandoned Panama diseased land was available for Valery production." (Conclusion of Law 5).

"(Third Claim) Sunderland [UF's former president] recommended closing Tiquisate for legitimate business reasons, no so that United could achieve monopoly power in the importation of bananas." (Conclusion of Law 11).

"Sunderland, who made all key decisions regarding the operation and closing of Tiquisate, as well as concerning United's relationship with IRCA, did not take any action with specific intent to monopolize; to the contrary, he took affirmative steps to assure that United complied both with the consent decree and the anti-trust laws." (Conclusion of Law 12).

mony as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala." —— F. Supp. at ——. As Judge Learned Hand observed in *United States* v. *Aluminum Company of America, supra,* 148 F.2d at 433, "Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far [reversing findings of fact]; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases." Here there was no conflicting direct testimony. In fact, IRCA's president conceded that "it was perfectly understandable" for UF and CAG to consider rates "since the Tiquisate division was losing money and the rate was a factor."[21]

The claim that UF had disposed of its property in such a way that no banana producer was able to utilize it and by expressly restricting the uses to which the property could be put, again is not supported by the record. The court below found that the plaintiff had failed to prove the existence of any purchaser who had the "intent, preparedness and capacity" to grow bananas at Tiquisate;[22] that no such purchaser was prevented by UF from acquiring the land;[23] and that there were no restrictions on the future use of land sold at Tiquisate.[24]

21 Conclusion of Law 13(h).

22 Finding of Fact 213.

23 Finding of Fact 214.

24 Findings of Fact 196, 212; see note 15 *supra* and accompanying text. We further note that those selling land for UF were not instructed to refrain from selling to banana growers (Finding of Fact 216); and that purchasers used the property to grow cotton and not bananas because of agronomic and economic advantages (no blowdowns, no Panama disease, the availability of truck transportation rather than rail) and the Guatemalan government's encouragement of cotton growing (Finding of Fact 218) as well as its opposition to banana growing (Finding

Appellant argues that O. Roy Chalk, who was chairman of the IRCA Board from 1963 to 1966, was very much interested in the purchase of Tiquisate so that IRCA would not lose freight in the event of a UF abandonment. In addition, appellant contends that Chalk planned to form a new company to conduct a banana production operation and that the purchase would comply with the antitrust divestiture decree.[25] We agree with appellant that UF was initially interested in the Chalk deal and pointed out the advantages of Tiquisate as banana growing property. This however is hardly indicative of an interest to prevent competitors from entering the field. The letter of John M. Fox, UF's Executive Vice President, to Chalk dated November 1, 1963, upon which appellant relies to demonstrate UF's interest in the sale, also points out that Chalk as chairman of IRCA might be able to decrease the freight rate and the poor freight service which had deteriorated to the point that it was then taking twice as long to transport bananas as it had previously.

There can be no doubt that UF did pursue the Chalk negotiations by meetings and telephone calls over a six-month period. Neither is there any doubt that at a meet-

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of Fact 220). While there was a finding that a few leases did preclude banana production, the court below also found that this was not a "general policy" and in fact the weight of the evidence was to show that UF sold the land generally without restriction.

25 That decree provided in pertinent part that "United shall sell to an Eligible Person (as hereinafter defined) production and transportation assets . . . including producing banana lands or producing banana lands and banana purchase arrangements, ships, and other essential accessory assets, reasonably calculated to be capable of importing annually into the East Coast, Gulf Coast and/or West Coast ports of the United States approximately 9,000,000 stems of bananas per year . . . ." As already noted, the term "Eligible Person" specifically excluded Standard Fruit, then UF's chief competitor. However, the Justice Department expressed some misgivings about whether a sale of Tiquisate to Chalk would comply with the consent decree. Finding of Fact 241.

ing in Boston on January 9, 1964 the Chalk negotiations were terminated by a unanimous vote of 17 of its top personnel. No minutes were kept and the only contemporaneous documentary evidence of what transpired was a memorandum entitled "Re: Consent Decree Problems," with Sunderland's hand-written statement, "All present were in favor of not selling to Roy Chalk." Appellant argues, without citation of authority, that it was reversible error for the court below to accept Sunderland's testimony as to reasons for rejecting Chalk which were inconsistent with other documentary evidence.

We have carefully examined the documentary evidence relied upon by appellant and cannot reasonably find it was inconsistent with the Sunderland testimony. Most pertinent to the issue is a letter from UF's executive vice president Fox to Chalk on January 10, 1964, advising him that only a few hundred acres of banana producing land remained which had not been sold or committed to others. While Fox's prior letter of December 23rd as well as a Sunderland-Fox-Chalk conference call of the same date had indicated that ample acreage was available or could be reacquired from purchasers, Fox on January 10th described the previous estimates as "overly optimistic." He further stated that the company could not renege on its commitments to Guatemalans, including employees with long service records who had planned on acquiring the property with their severance pay. He further explained that his present information was based on the report of UF's Guatemala manager, T.A. Holcombe, who flew to Boston to report the present status of the property on January 9th. There is nothing in any of the correspondence or documents relied upon by appellant which supports its position that UF failed to sell because Chalk would be a competitor. Had that been the posture of UF, one wonders why the long period of

negotiation with Chalk.[26] Appellant's argument is based solely on inference and a characterization of the January 10, 1964 letter as a "cover up." Our review of the record persuades us that UF was concerned with the eligibility of Chalk as a purchaser as well as the eligibility of Tiquisate under the consent decree. The conference call of December 23, 1963 repeatedly indicates the concern of Sunderland that Department of Justice approval be obtained as well as a recognition that the property could not be held indefinitely for Chalk. The optimism of Fox and Sunderland even at that late date that the property could be assembled despite prior commitments, was in error as the Holcombe report established. However, that enthusiasm to make the deal despite Chalk's indications of reluctance are totally inconsistent with appellant's claim that Chalk was frozen out because he would be a prospective competitor. The

26 Appellant argues that the court below committed "clear error" when in its opinion it stated that Chalk "apparently wanted to buy the Tiquisate land at $100 an acre (the upset price), get the equipment and plant for nothing, and buy it as a divestiture under the consent decree which would also require UF to sell him the appurtenances needed for a going business including a steamship fleet worth $5 million." Appellant argues that under section VIII (A) or (B) of the consent decree production assets were required to be sold, and that since Chalk in his letter of December 30, 1963 to Fox referred to that section, he could not have intended to get the assets for nothing. While Chalk may have been familiar with the decree, the letter referred to talks about the "purchase" by Chalk of *acreage;* it goes on to say, "it will be necessary for you *to turn over* to us simultaneously all the facilities . . . ." (emphasis added). This is susceptible of the interpretation stated by the lower court. The memorandum of the conference of September 30, 1963 between UF and Chalk is enlightening. Mr. Blow commented, "Mr. Chalk then turned to Paragraphs B and C of Article VIII of the consent judgment. He said of Paragraph B that this paragraph necessarily called for 'a real money negotiation' and that his interest was in buying 'cheap.'" In view of Chalk's failure to come up with a total price or a means of independent financing, we agree with the court below that it is doubtful in any case that the Department of Justice would have permitted a divestiture to Chalk.

court below was particularly painstaking with respect to the Chalk transaction, devoting fourteen pages of detailed findings which are buttressed by references to the testimony and exhibits.[27] We find them not to be clearly erroneous and in fact fully supported by the record.

To bolster its position that the closing of Tiquisate was justifiable, UF presented a large amount of agronomic and financial evidence to establish that this operation was financially unsound and was the worst of all the divisions in which to produce Valery bananas. Appellant urges as it did below that certain cost figures were inaccurately determined. UF produced expert testimony to support its conclusions and appellant produced none. Whether or not the data was precise in all respects is not here relevant. The district court, even though it assumed arguendo that the appellant's cost estimates were accurate, nonetheless found that at the time they were received by Sunderland he had no reason to question them and his reliance upon them was justified. There was no proof that they had been fabricated in order to provide a spurious basis for the action taken. The trial judge credited the testimony below that the action was taken on the basis of the reports and represented a legitimate business decision, not one based on contrived documents. We find no error in the findings below.

Reductions in shipments from Tiquisate after 1961 give no basis for antitrust liability. The court below found that Panama disease and blowdowns created whatever reductions occurred.[28] There is no proof that UF was motivated by any vindictive or anti-competitive considerations.

27 See in particular Findings of Fact 241-44.

28 Findings of Fact 176, 183.

(b) The First Claim—Discriminatory Practices

The first antitrust claim made below was predicated on alleged violations of sections 1 and 2 of the Sherman Act by reason of the discriminatory and repressive practices of UF-CAG which prevented other competitors from using IRCA facilities and also by virtue of preferential treatment accorded to UF-CAG, all of which caused IRCA to lose profits. The claim is bottomed on the theory that IRCA was a victim of UF-CAG by reason of the latter's stock control of IRCA and also because of contractual obligations imposed upon IRCA. As we have previously indicated, the recovery period commences on February 16, 1961. The court below found that there was no continuing discrimination resulting either from prior domination of IRCA by UF-CAG or from any contract provisions which survived into the statutory recovery period.

Appellant cites a variety of antitrust cases involving per se monopoly and restraints of trade, most of which seem to be completely irrelevant and shed little light on the issue. In any event, the findings below establish without question that after February 1961 IRCA could not be sensibly characterized as a captive of UF-CAG. From February 16, 1961 onward no UF employees or officers were on the IRCA board; UF had sold all but one hundred shares of its IRCA stock by January, 1962 and had made diligent efforts to dispose of it prior to that date; UF did not even vote its stock at the IRCA stockholders' meeting on May 31, 1961. UF was of course required by the consent decree to divest itself of its IRCA stock and there is nothing in the record to indicate that it did anything violative of the letter or spirit of the decree. In sum, the argument that IRCA was a helpless pawn of UF during the recovery period is completely unpersuasive.

The 1958 consent decree also prohibited contracts which would require IRCA to discriminate against other shippers. Counsel for IRCA, UF and the *Ripley* plaintiffs studied the existing contracts and found no discriminatory provisions. Distinguished outside counsel for IRCA advised UF that there was no agreement between UF and IRCA which did not comply with the provisions of the decree prohibiting discrimination. However, appellant argues that the court below was in error in finding that IRCA was not contractually obligated to discriminate in favor of CAG and UF against their competitors because the court overlooked a letter supplement to the 1948 "operation of trains agreement" which obligated IRCA to utilize certain locomotives and banana cars primarily for the use of CAG and secondarily for UF and for general public use only thereafter. That agreement did not expire until 1968. Moreover, the findings below are inconsistent as to whether or not IRCA did give preference to CAG in the allocation of banana cars. In Finding of Fact 57 the court found that "IRCA did not discriminate in the allocation of banana cars." However, in the opinion the statement is made that "[t]here is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast."

Assuming however that discrimination did exist, the question remains whether or not IRCA has established any injury. Appellant argues that under *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) no public injury need be established where a per se Sherman Act violation has occurred. But of course it does not follow that a private plaintiff can recover without proof that he has in fact been damaged. Even assuming that IRCA has standing to sue here (see *Long Island Lighting Co.* v. *Standard Oil Co.*, 521 F.2d 1269, 1273-74 (2d Cir. 1975),

U.S. app. pending; *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-96 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972)), plaintiff was not a competitor of UF-CAG and can only establish its damages if the allocation of cars precluded Standard from fuller use of IRCA equipment. In 1961, the only year during the recovery period when both Standard and CAG were competing, there was no proof of any shortage of banana cars; Standard never cancelled a cutting and never missed a ship.[29] Nor was there any evidence that Standard ever asked IRCA to give it a greater share of the use of CAG cars or that IRCA ever refused such a request.[30]

Appellant's argument is totally "post hoc, ergo propter hoc": since in fact Standard did not expand and did eventually leave Guatemala in 1961, it must have been because UF-CAG had conspired to prevent expansion and to drive its only competitor out. There is no proof at all of this and in fact the court below found Standard left Guatemala "so far as the unrefuted evidence shows, only because a 'blow-down' destroyed its plantations in 1961."

We conclude that even though a preferential banana car allocation clause remainded unexcised despite the scrutiny of counsel, appellant has failed to prove any damage. In view of the chastening effect of the *Ripley* judgment and the terms of the consent decree, and the finding of the court below that UF was in good faith attempting to live up to the terms of the decree, it cannot be argued reasonably that UF-CAG through coercive means or by insistence on contract terms was demanding preferential treatment.

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29 Findings of Fact 59, 88.

30 Finding of Fact 95.

We have further reviewed appellant's other claims of discriminatory practices as to wharfage charges, practices and services at the pier, banana line haul rates and import line haul rates, all of which were discussed extensively below and rejected; we too find they are without merit and, for the most part, are based upon speculation rather than proof.

(c) The Sixth Claim—Section 7 of the Clayton Act.

In this claim, plaintiff seeks the same damages sought under the first Sherman Act claim but on the theory that the acquisition of IRCA stock by UF in 1928 and 1936 constituted a violation of section 7 of the Clayton Act, 15 U.S.C. § 18. Even though the acquisition here preceded by many years the recovery period, it is clear that section 7 is applicable. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957). In that case du Pont had acqired a twenty-three per cent stock interest in General Motors approximately thirty years before the United States brought an action under section 7 of the Clayton Act for equitable relief, alleging that because of the stock interest, du Pont had obtained an illegal preference over competitors in the sale of supplies to General Motors. That stock interest continued until the time of suit. The Court held:

> The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat that the test of a violation of § 7 is whether, *at the time of suit*, there is a reasonable probability that the acquisition is likely to result in the condemned restraints.

Id. at 607 (emphasis added).

The court below, applying the *du Pont* rule, noted that the suit here was commenced in 1965 and since UF had sold its stock in 1962, "[a]t the time of the suit there was no possibility" of a potential lessening of competition or monopoly by reason of the acquisition. Appellant seeks to get away from the emphasized phrase on the basis that since in the *du Pont* case the United States was seeking divestiture, the Court meant only that the action would have been moot if du Pont had already disposed of its stock. It claims that where, in contrast, the section 7 plaintiff is a private litigant seeking *damages* the four year statute of limitations of section 4 of the Clayton Act (15 U.S.C. § 15b) is vitiated if the "time of suit" test is employed. In view of the Supreme Court's expressions that Congress intended private antitrust litigation to be one of the surest weapons for effective enforcement of the antitrust laws, e.g., *Minnesota Mining & Manufacturing Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965), and our own previous holding in *Gottesman* v. *General Motors Corp.*, 414 F.2d 956, 961 (2d Cir. 1969) that section 4 be given a broad and not a narrow construction, we agree with appellant that the eleven month period between February 16, 1961 and the sale of the IRCA stock by UF in January 1962, is the relevant period to determine section 7 liability.[31]

31 See, e.g., *Poster Exch., Inc.* v. *National Screen Serv. Corp.*, 517 F.2d 117, 124-29 (5th Cir. 1975) (re alleged antitrust conspiracy and monopoly. Court relied on the "continuing conspiracy" theory, i.e., that plaintiff "is entitled to recover for damages accruing during the four year period preceding this suit which have been caused by continuation of the alleged injurious acts of the alleged conspiracy and monopoly during that period," to uphold plaintiff's claim against a statute-of-limitation defense); *Twin City Sportservice, Inc.* v. *Charles O. Finley & Co.*, 512 F.2d 1264, 1270 (9th Cir. 1975) ("A civil cause of action under the [antitrust acts] arises at each time the plaintiff's interest is invaded to his damage, and the statute of limitations begins to run at that time."); Stein, Section 7 of the Clayton Act as a Basis for the

However, the mere fact that UF continued to hold IRCA stock during this period does not automatically impose section 7 damage liability. *Gottesman* v. *General Motors Corp., supra*, 414 F.2d at 961. Plaintiff must also show that between February 16, 1961 and January 1962, UF did in fact so use its stock ownership as to cause injury to the plaintiff as a result of the anticompetitive effects proscribed by section 7. Id. at 965.

The record is devoid of any evidence that UF used its stock position in IRCA during the period in question to influence IRCA in any way. As we have previously noted, there was no proof that United controlled any IRCA directors from 1961 on; any control over IRCA by UF had been dissipated after February 16, 1961 despite its continued ownership of shares, which it was diligently seeking to sell; it did not even vote its stock at the annual meeting of May 1961. We repeat that UF had already been the victim of a large damage verdict in a derivative stockholder action brought by minority IRCA stockholders. It had further entered into a consent decree in 1958 forbidding discriminatory practices and requiring partial divestiture. In view of the sanctions already applied UF's concern during the statutory period with its antitrust liabilities is obvious. We therefore see no merit in the section 7 claim since there is no evidence of the use of stock voting power by UF; to the contrary, there is in fact an abandonment of the tactics which had created its prior difficulties

Treble-Damage Action: When May the Private Litigant Bring His Suit?, 56 Calif. L. Rev. 968, 980-95 (1968) and cases cited. Cf. 1 M. Handler, Twenty-Five Years of Antitrust 243-44 (1973) (originally published as Handler, Annual Review of Recent Antitrust Developments, 12 Record of N.Y.C.B.A. 647 (1957)) (*du Pont* stands for proposition that "[i]f there is a reasonable probability that the *retention* of the stock may result in the prohibited anticompetitive consequences, the Government may take action regardless of the passage of time" (emphasis added)).

with the Department of Justice as well as with IRCA's minority stockholders.

IV. The *ZENITH* Claim

Although this court has previously held that all claims under the antitrust laws arising prior to February 16, 1961 were time barred, 373 F.2d at 416-17, the appellant claims that under *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (decided after our prior decision but before the opinion below), it may recover damages resulting from acts prior to February 16, 1961. *Zenith* holds in effect that even though the acts creating the injury preceded the February 16, 1961 cut-off date, damages may be recovered if in fact and as a result injury was incurred after that date and if prior proof of those damages would have been impossible because their accrual was speculative or their amount and nature unprovable. Id. at 339-40.

Zenith involved a conspiracy which continued into the damage period; as noted by the court below, it is not clear that the *Zenith* exception to the usual antitrust period of limitations would be applicable to a case such as this where the conspiracy had been terminated prior to the damage period by the consent decree and the *Ripley* judgment. In any event, Judge Gurfein found that *Zenith* was not applicable since there was no proof that prior antitrust violations had caused damages during the period after February 16, 1961. That such a causative link between the alleged antitrust violation and the alleged injury is necessary to plaintiff's claim is clear. E.g., *Billy Baxter, Inc.* v. *Coca-Cola*, 431 F.2d 183, 187 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

We need say nothing more about the third claim which is principally based on events occurring within the limitations period. With respect to the first claim, appellant

urges that because of UF's prior monopolistic and discriminatory practices, other competitors were precluded from entering the banana production business in Guatemala, thus preventing IRCA from reaching "its maximum potential" by February 1961, and therefore its revenues were less than they should have been during the damage period. Moreover, this damage, it is argued, was purely speculative prior to the cut-off date, thus bringing it within the *Zenith* exception.

We agree with the court below that while this is a good antitrust theory, plaintiff nonetheless has the burden of establishing that either UF's competitor Standard was discouraged from expanding its holdings or that other potential competitors of UF were prevented from entering the field by UF's pre-1961 antitrust activity. IRCA, which offered no evidence whatever of Standard's frustration or independent entry preclusion by UF, again argues that since the pre-1961 violations were per se violative of the Sherman Act[32] there is no need for it to establish that its customers had the intention, preparedness and capacity to ship more bananas than they actually shipped. But the law seems well settled that the private antitrust litigant has to establish the fact of damage (here, its loss of customers) by evidence of the existence of ready, willing and able purchasers of IRCA services. See *Zenith*

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32 The cases relied on by appellant (e.g., *United States* v. *Reading Co.*, 253 U.S. 26 (1920); *Standard Oil Co.* v. *United States*, 221 U.S. 1 (1911)) for the proposition that "equipment discrimination" constitutes a per se violation of the Sherman Act are not in point. We need not elaborate since, as we have already indicated, the plaintiff here as a private antitrust litigant must establish that in fact damage occurred. Under the *Zenith* principle the causative acts must have occurred before 1961 but the damage must not have been provable until after 1961. Neither requisite was established here.

We also note that equipment preferences or discrimination are not to be found in the usual litany of per se violations under the antitrust laws, e.g., *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958).

Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100, 126-27 (1969); *Martin* v. *Phillips Petroleum Co.*, 365 F.2d 629, 633 (5th Cir.), cert. denied, 385 U.S. 991 (1966); *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395-96 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963). This principle was properly applied below. IRCA now claims that this rule only applies where the defendant's competitor is the antitrust plaintiff. While it is true that the cases announcing the principle all involve actions by putative competitors seeking to establish lost profits, it must apply a fortiori to IRCA whose alleged lost profits are dependent upon the presence of a viable customer. The contention that the court below committed error on this point is therefore frivolous.

V. Remaining Claims and Conclusion

Appellant's contract claim is without merit and we affirm this point on Judge Gurfein's well reasoned opinion below (358 F. Supp. 1363). Appellant also claims error in the exclusion of certain *Ripley* findings which it alleges are collaterally binding upon UF. We find no abuse of discretion by the trial judge who wrote separate memorandum opinions (filed April 26 and May 15, 1974) stating the basis for his determination. The further claim that certain documents were improperly excluded is equally meritless. There is no indication that any of the documents would have changed the result below.

We conclude that appellant's antitrust theories which would impose liability under sections 1 and 2 of the Sherman Act and section 7 of the Clayton Act are untenable given the findings of fact below. Even assuming standing, post-1961 monopoly, and the application of the intracorporate conspiracy doctrine, all of dubious validity here, it is clear that no liability exists. Appellant's

only chance of success on this appeal depends upon a showing of clearly erroneous findings of fact. Our review shows that the findings are predominantly supported by the record and where they are not, cannot be termed clearly erroneous, particularly in view of the court's conviction that the UF officers' testimony was straightforward and credible. Plaintiff's case rests in sum primarily upon dubious and unsupported inferences. While the appellant has assiduously combed the extensive record here and extracted occasional comments which tend to serve its purpose, the errors uncovered are either harmless or in fact are overborne by the weight of the evidence.

The judgment below is therefore affirmed.

Appendix B

OPINION OF UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
FILED JANUARY 29, 1975

GURFEIN, Circuit Judge (sitting by designation):

This is an opinion after trial on the issues of liability alone. An earlier opinion on the motion for summary judgment by the defendants stated the history of the litigation between the parties and the claims in the present complaint. International Railways of Central America v. United Brands Co. and Compania Agricola de Guatemala, 358 F. Supp. 1363 (S.D.N.Y. 1973). 1/ The summary judgment motion was denied, but partial summary judgment was granted dismissing the antitrust claims for acts committed before February 16, 1961; and dismissing the contract claims against United Brands ("UB"), formerly United Fruit Company ("UF") for breaches committed after December 31, 1962 (contract expiration date) and before January 1, 1961. With respect to breaches of contract claimed against Compania Agricola de Guatemala ("CAG") they were dismissed if committed after December 31, 1962 (contract expiration date) and before October 9, 1962.

The case was tried to the Court without a jury with the applicable statutory recovery period for alleged antitrust violations designated as only from February 16, 1961; and for alleged contract violations against UB between January 1, 1961 and December 31, 1962. 2/ Detailed findings of fact are being filed herewith.

To restate the issues briefly:

International Railways of Central America ("IRCA"), the plaintiff, was dominated for many years by UF which was its controlling stockholder and which also controlled its Board of Directors. 3/ UF is, and has been, for more than half a century in the business of producing, buying and transporting bananas for the purpose of importing them into the United States, as well as other countries. CAG, a wholly-owned subsidiary of UF, owned and operated banana plantations in western Guatemala in an area around Tiquisate. IRCA was a railway in Central America which, among other things, carried bananas in Guatemala from the east coast to the seaboard Port of Barrios on the Atlantic Ocean for UF and from the west coast to Barrios for UF's wholly-owned subsidiary, CAG, as shippers.

As will appear, UF sold its stock in IRCA, save for 100 shares, in January, 1962. 4/ The Guatemalan Government seized IRCA's assets in 1969 for alleged default on a Government loan. The corporate entity remained and is the present plaintiff.

The surviving antitrust claims in this litigation are:

First Claim: that UF's repressive tactics prevented other banana shippers from using IRCA's railroad facilities from February 16, 1961 to December 31, 1961, in violation of Sherman Act Section 1 (15 U.S.C. §1).

Third Claim: that UF restricted its own banana shipments over IRCA from

February 16, 1961 to 1964, and disposed of its Tiquisate banana plantations (on the west coast of Guatemala) in violation of Section 2 of the Sherman Act (15 U.S.C.§2).

Sixth Claim: that acquisition of control of IRCA by UF was in violation of Section 7 of the Clayton Act (15 U.S.C.§18).

Earlier Proceedings

Beginning in February, 1949, certain shareholders of IRCA had begun a derivative suit against UF in the New York Supreme Court charging that UF had breached its fiduciary duty to IRCA. 5/ In 1956, the Supreme Court so held and awarded a judgment for over $4.5 million for the period before 1956, and ordered an increase in freight rates prospectively to the termination of the contracts. In March 1961 a supplemental judgment awarded IRCA close to $5 million more, representing the increased rates from January 1956 through December 1960, which had been accrued but not yet paid pending the outcome of the appeal. The New York Court of Appeals affirmed the judgment, 8 N.Y.2d 430 in 1960, and finally denied rehearing on February 23, 1961, 9 N.Y.2d 758. The full amount of the judgment was then paid.

After collecting the $8.5 million from UF, IRCA retained some of the able attorneys who had succeeded in the first action to sue in the Federal Court claiming antitrust violations and breaches of contract. The action was begun on February 16, 1965 -- four years after the final order of the New York Court of Appeals. 6/

In the meantime, the United States had started a civil antitrust suit against UF in 1956 which resulted in a consent decree in 1958.

UF moved to dismiss the present claims as barred because of the prohibition against the splitting of causes of action and on the ground that they were barred by the statute of limitations. On the antitrust claims this court (Ryan, Ch.J.) dismissed the complaint on the antitrust claims, finding that there had been a splitting of the causes of action because "the facts presented to the New York court in the Ripley case were substantially the same as those presented by this litigation." 254 F. Supp. 233, 237 (S.D.N.Y. 1966).

The Court of Appeals for the Second Circuit disagreed that there had been a splitting of the causes of action: "[s]ince the Ripley complaint did not and could not properly have asserted a claim under the federal antitrust laws [since the New York courts do not have jurisdiction to determine such issues] the judgment cannot have adjudicated that UF violated them." 373 F.2d 408, 419 (2 Cir. 1967), cert. denied, 387 U.S. 921 (1967). The Court of Appeals affirmed the District Court's finding that the Statute of Limitations barred suits for antitrust violations committed before February 16, 1961, which is the law of the case.

Six years after the Court of Appeals' decision, UF (now UB) moved for summary judgment as related above. On the antitrust claims it argued that IRCA had no standing to sue. In the opinion mentioned above, 358 F.Supp. 1363, this Court held, as indicated, that there were issues of fact to explore which prevented summary

judgment for the defendant without a trial of the issues. The Court said:

> "The gravamen of the present claim that survives the limitations defense is that UF then [after the Ripley decision] turned upon IRCA as reprisal for its insistence on the fulfillment of the Ripley judgment and aimed its antitrust violations at IRCA as a direct and prime target. It is said to have cut is banana production on the West Coast for the purpose of laying IRCA low, and to have restricted the use of its Tiquisate land for banana growing not only to thwart its potential competition but also for the avowed purpose of directly harming IRCA." 358 F. Supp. at 1372-73.

To understand this reference, a brief statement about Tiquisate is in order at this point. UF's subsidiary CAG operated banana plantations on the west coast of Guatemala in an area called Tiquisate from the 1920's to 1963 or 1964. All the bananas grown or purchased by CAG on the west coast were transported to Barrios via IRCA. The claim with respect to standing which was principally considered on the summary judgment motion, was that UF had deliberately abandoned Tiquisate in reprisal against the Ripley judgment and against IRCA's refusal to lower the freight rates provided therein.

While I based my opinion denying summary judgment primarily on the disputed issues of fact concerning the alleged abandonment of Tiquisate, I did not finally determine whether IRCA had standing on

its other theories. UB had contended that since IRCA was not its competitor, its alleged antitrust violations were directed against others than IRCA, and that any harm to IRCA was merely of incidental effect.

On the trial, resourceful counsel for the plaintiff did not limit their antitrust claim to the Tiquisate abandonment and its consequences. Instead, they have sought to take full advantage of the decision of our Court of Appeals that they had not split their cause of action.

Accordingly, they have contended that UF was in a conspiracy with its subsidiary, CAG, to restrain trade for many years -- going back a half century -- and that some of this restraint continued into the period after February 16, 1961. They also contend that certain acts committed before February 16, 1961 had an effect after that date because the damages were allegedly not calculable at any time before the statute had run. The plaintiffs contend that such damages are recoverable despite the claimed bar of the statute under the doctrine of Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971).

The defendant takes sharp issue on these claims, urging that conditions of alleged control and domination had so changed by 1961 that no carryover of antitrust violation (if it ever existed) can be presumed and that the plaintiff has failed to prove such control and domination. It asserts further that Zenith, supra, has no bearing because, in any event, there were no pre-1961 damages that were incalculable at the time and have become calculable since.

It contends also that the plaintiff has failed to show any causal connection between any pre-1961 act and an impact therefrom after February 16, 1961.

Changes in Relationship

With the statutory limitation of February 16, 1961 in mind, let us review the changes that had occurred by that date in the relationship of UF to CAG to IRCA. I noted in the earlier opinion, 358 F. Supp. at 1367, that the New York Court of Appeals had affirmed the Referee's decision requiring UF to pay higher rates to IRCA for transportation of bananas, $130 per car, a rate equal to that charged its competitors, in 1960; and that the United States had obtained a consent decree against UF in 1958, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. Judge Ryan had found, and our Court of Appeals did not disagree, that, since 1959 IRCA had had several independent directors who had the requisite knowledge to bring suit against UF for antitrust violations. 7/

By February 16, 1961 the control of IRCA by UF had been dissipated. While it still owned the IRCA stock which was not sold until January, 1962, it was required under the consent decree to divest itself of the IRCA stock by 1966. I find that the IRCA board was independent of UF by February 16, 1961. At the May, 1961 IRCA stockholders' meeting, UF did not vote its shares. The freight rates on banana transportation were governed by the Ripley judgment.

The consent decree, in Paragraph VI(A)(9), prohibited contracts between UF

and IRCA requiring IRCA to discriminate against other shippers. Counsel for IRCA, UF and the Ripley plaintiffs independently studied the contracts and found no language requiring discrimination that should be abrogated. 8/ We shall deal later with the claim that IRCA in fact was compelled to discriminate against Standard Fruit ("Standard"), UF's only competitor in Guatemala.

The conclusion of counsel that there were no clauses requiring IRCA to discriminate would have had to be wrong if "discrimination" actually continued, since, if the contracts themselves did not require it, there was no proof adduced that the IRCA board was subservient enough in the statutory recovery period to take orders from UF or CAG. On the contrary, since we know from Judge Ryan's finding that there had been at least three independent directors since 1959, one would expect to find any discriminatory act of the IRCA Board resulting from domination by UF to have met with their articulated dissent. The IRCA Board Minutes are in evidence (DX 552) but they show no instance of a split vote on rates or practices.

The Factual Issues

Among the factual matters to explore on the antitrust phase of the case are, therefore, (A) whether UF caused IRCA to discriminate against UF's competitors or potential competitors to the detriment of IRCA and (B) whether Tiquisate's termination (and its operation in the statutory period) were for the purpose of suppressing competition in the import of bananas into the United States and to harm IRCA

in reprisal for Ripley; or whether, as the defendant contends, the termination as well as the operation of Tiquisate were dictated by legitimate business considerations.

A. Alleged discrimination against other shippers and potential shippers

The gravamen of the Ripley complaint was that UF had breached its fiduciary duty to IRCA by insisting upon a large differential in the freight rate for banana shipments on the line haul from the west coast to Puerto Barrios which was charged to UF and which was charged to competitors to the great advantage of UF and to the detriment of IRCA.

In this case, the plaintiff is not claiming any discrimination in the rates paid on the line haul after February 16, 1961 (P. Answering Memo "PAM" p.111). 9/ There is good reason for the concession. 10/ The line haul rates were fixed for the period from 1956 to the end of the contract by the Ripley court and complied with by the defendant. I have previously found the termination date of the contract involved to have been January 1, 1963.

The claim, in this respect, reduces itself to claims (1) that alleged discrimination in rates before February 16, 1961 had injurious effects after 1961 and are compensable; (2) that certain other discriminatory charges, other than the line haul freight rate itself, continued as discriminatory action after February 16, 1961. These alleged discriminations are: (1) dock charges; (2) total banana transportation costs; (3) import line haul rates; (4) wharfage on imports; (5) diesel oil freight rates; (6) practices at the pier. These very claims were essentially before

the Ripley court on claims of unfairness. That court did not require any of the practices involved to be changed or compensated for.

With respect to these claims of discrimination in favor of UF against its competition, I find the following facts:

1. Dock charges

Both before and after 1961 CAG paid no wharfage charges to IRCA (which owned the wharf). CAG loaded and unloaded its ships at Barrios with its own labor. Standard, its competitor, was required to pay IRCA for the loading and unloading operations a wharfage fee of $3 per ton and a fee computed from the cost of IRCA's loading crews (TR. 73; 313). The plaintiff failed to call any of Standard's personnel as a witness.

The plaintiff has failed to prove that it did not cost CAG as much to load and unload as the charge paid by Standard to IRCA for handling these operations. There is also no proof that Standard was arbitrarily denied, at the behest of CAG, the right to use its own labor in the process. There is evidence that Standard discussed this matter with IRCA in 1957. On July 2, 1957 the IRCA board adopted a resolution to advise Standard that IRCA would agree to eliminate wharfage and switching charges if satisfactory arrangements could be made with Standard's labor to take over the unloading. Nothing came of the suggestion for reasons not in evidence.

On March 15, 1971, by which time I find that the IRCA Board was independent

of the defendant, the board was informed that Standard wanted a cancellation of the wharfage charge on export banana traffic. Again there is no evidence that anything further was done about it before Standard left Guatemala entirely as the result of a hurricane "blowdown" of its west coast plantations in November, 1961. Nor is there any evidence that UF had anything to do with the decision, whatever it may have been. I find that there is no evidence of discrimination on the wharfage charge. I find further that it was essentially a loading and unloading charge rather than a separate charge for the use of the pier apart from its connection with the loading and unloading services performed by IRCA.

2. Total banana transportation costs

Standard was in business in Guatemala after February 16, 1961, but only until November of that year. During that period, as we have seen, UF was required under the Ripley judgment to pay the public tariff rates, which it did. Though the freight rate paid by both shippers was the same, the plaintiff contends that there was, nonetheless, a differential in favor of UF over Standard, because UF's so-called "banana loading expense" at Barrios for 1961 was $34.04 per car (DX 536 while Standard was paying IRCA $36 per car wharfage "plus at least $10 for loading aboard ship" (Tr. 424). Standard also had unspecified expense in running its own conveyors at Barrios (Tr. 157-60).

On the other hand, I find that IRCA rendered "spotting services" to Standard -- spotting its empty banana cars at locations on its banana farm (Tr. 1339-40)

while CAG spotted its own cars at its own expense and turned their cars over to IRCA only at the junction at Rio Bravo. CAG operated its own 90 mile railway which it maintained and operated with its own locomotives and crews (Tr. 1338-39). Moreover, the line haul for Standard was 70 miles more each way than for CAG. I find that the differential claimed by plaintiff is not supported by adequate proof in view of the fact that IRCA rendered greater services to Standard than to IRCA. Plaintiff has failed adequately to establish these extra costs to CAG which would have to be part of the equation to make both sides equal.

C. Import line haul rates

The plaintiff contended that there was discrimination in freight rates going the other way -- on imports to the west coast. Plaintiff concedes that there was no such discrimination in the statutory recovery period. (PAM 117-118).

D. Wharfage on imports

Under its contract CAG was required to "pay wharfage at the rate of $1.00 per ton in the case of import freight other than that which is for sale in the Company's stores which will be charged at $3.00 per ton" (PX 901, p.1). In any event, as plaintiff concedes "The only year in the statutory recovery period in which Standard was also importing materials was 1961" (PAM 119). There is no documentary proof of wharfage charges paid by others.

The testimony of Haase, president of IRCA, that the published tariff rate was higher than CAG's special contract rate (Tr. 89; PAM 119) is not specific enough regarding applicable time periods to apply to the period from February 16, 1961 to November, 1961 when Standard ceased opera-

tions in Guatemala after a hurricane (Tr. 72; 212).

E. Diesel oil freight rates

Plaintiff claims that there was discrimination on the freight rate that IRCA charged CAG for transporting diesel oil. There is no evidence of whether the quantity of diesel oil imported by Standard on the east coast and shipped to the west coast in the nine months of the statutory recovery period was of any significant amount. So far as the record shows, none may have been imported in the period in question. In any event, Haase, the only witness on the subject, was unable to point to the particular years when a differential existed (Tr. 388-89).

F. Practices at the pier

The IRCA pier at Puerto Barrios was used by both UF and Standard. UF used the north side of the pier where it had conveyors for lading and unloading its ships. Standard generally used the south side of the pier where it had placed its conveyors on an apron. Again we are talking only of the nine months during the statutory recovery period.

UF had installed its conveyors on the north side of the pier many years before Standard came to Guatemala. It should be noted that cargos other than bananas used other parts of the pier to avoid interference (Tr. 82).

Plaintiff contends that it was discriminatory for UF to have the north side of the pier, where the water was several feet deeper and could accommodate larger vessels, for itself. I find that there is no evidence

that the ships used by Standard were too small for its purposes or that Standard ever asked for the privilege of using the north side of the pier. In the absence of any such evidence, the claim that the pier was used in discriminatory fashion during the statutory recovery period is sheer speculation.

G. Allocation of banana cars

There is no doubt that CAG was given preferential treatment over Standard in the transportation of bananas from the West Coast. (Tr. 351 The plaintiff, however, does not complain "that IRCA suffered any damages on shipments made by Standard but that Standard's capacity to ship from Western Guatemala was not fully developed because of United's [UF's] anti-competitive and monopolistic practices." (PAM 125).

According to Haase, banana cars were apportioned to CAG on a preferential basis in the years 1960 and 1961 (Tr. 69-72). He conceded, however, that the allocation of banana cars never caused Standard to miss a ship or a cutting and that the delay never exceeded 48 hours (Tr. 345-48). This does not evidence a horrendous situation where Standard simply could not plant and ship more bananas because of a shortage of banana cars. Haase believed that neither IRCA nor Standard ever suffered losses as a result of car allocations (Tr. 345-46; 411-12).

With respect to injury to the plaintiff, such evidence, if it existed, would relate not only to damages but to the question of injury itself. Without injury there could, at the threshold, be no standing to

recover. See GAF v. Circle Floor Co., 463 F.2d 752 (2 Cir. 1972), and the discussion on summary judgment in this case at 358 F.Supp. 1370-73.

It is, thus, my conclusion that so far as the statutory recovery period is concerned, there was no "continuing" discrimination into that period resulting either from (1) prior domination of IRCA by UF or from (2) contract provisions that survived into the statutory recovery period.

As the plaintiff properly suggests, "whether IRCA incurred injury after February 16, 1961 as a proximate result of United's [UF's] violations is, of course, a question of fact, e.g., Zenith Radio Corp. v. Hazeltine Research Inc., 401 U.S. 321, 323; Highland Supply Corp. v. Reynolds Metal Co., 327 F.2d 725, 732 (C.A.8)" (P.M. 45). (Emphasis added).

We shall consider whether there were violations of the antitrust laws which were not calculable in damages before 1961 but which became calculable in the statutory recovery period, after we consider the claims based on the abandonment of Tiquisate.

Third Claim

The Tiquisate banana growing operation was closed down in 1964 and the land sold by CAG. It is plaintiff's claim that this Western Guatemala operation was closed down in reprisal for IRCA's refusal to lower the freight rate set by the New York courts as a "fair rate" and that when the land was sold it was deliberately kept from banana cultivation in order to suppress competition in the import of bananas into the United States and as

further reprisal against IRCA for its obstinate refusal to reduce the rates.

It was primarily to enable the plaintiff to come forward with proof on these allegations that summary judgment for the defendants was denied.

The proof at the trial included testimony of Haase, former president of IRCA, and of Sunderland, former president of UF, as well as Van Diepen, Mason, and Fox, former officials of UF and CAG.

In addition, numerous exhibits were allowed in evidence. Each party has submitted proposed findings of fact, including findings related to the third claim.

Assuming, arguendo, that the relevant market for purposes of Section 2 of the Sherman Act is the importation of bananas into the United States solely from Guatemala, we must limn the scene as it existed in the early part of 1961 and shortly before.

The essential ingredients were: (1) CAG was now paying the freight rates on the long haul from Tiquisate to Barrios as ordered by the New York courts; (2) Sunderland had come to UF as President in November, 1959 (Tr. 662); (3) UF's earnings from its banana operations had declined from $58.6 million a year in 1950 to $7.2 million in 1959 (DX 135; Tr. 713-14); (4) A large element in the deterioration of the banana growing operation in Tiquisate was the spread of Panama disease which attacked the roots of banana plants and killed them (Tr. 670); areas infected with Panama disease had to be abandoned so far as cultivation of the common Gros Michel or Cocos type of banana was concerned (Tr. 1312); (5) another large element was the prevalence of "blow-downs," tropical storms which destroyed vast areas of Gros

Michel plantings; (6) competition from Ecuador was increasing; (7) Sunderland was required to find a solution to the economic difficulties of the company as a whole.

Alongside these problems were two other considerations: (1) UF did not like the rate set by the Ripley court and maintained that it could not live with it and (2) the contract with IRCA, as the defendants read it and as this Court later concluded, 358 F. Supp. at 1374-76, was to expire on December 31, 1962, at which time a renegotiation of rates would be in order.

Such a renegotiation never actually got off the ground. Though UF pressed it several times, IRCA took the position, unwisely as it turned out, that the contract did not expire until December 31, 1967, that the contract stood under the Ripley judgment, and that it would not lower the rate set by the Ripley court.

IRCA's refusal to lower the rate was in the face of clear intimations by UF, as plaintiff has shown, that, as an alternative, the defendants might have to discontinue the Tiquisate operation. I find that there was no promise that if the rates were lowered satisfactorily Tiquisate would be continued indefinitely as a banana operation. IRCA was made aware of the natural problems of Tiquisate, excessive Panama disease, excessive blowdowns, and the special problems of the banana ripening process in the long haul from Tiquisate to the Atlantic Seaboard.

IRCA knew that serious decisions would have to be made about Tiquisate, but it refused to budge. The parties were, of course, both inhibited before December 1, 1960 when the New York Court of Appeals rendered its decision, and, indeed, to February 23, 1961 when that court finally denied rehearing.

But, thereafter, by its inaction, IRCA made it evident that Sunderland would have to consider the freight rate set in the Ripley decision as an element in his final recommendation on Tiquisate. It is possible that if IRCA had been alert, as it should have been, to the obvious danger of its best customer leaving Guatemala, the negotiations for new rates would not have proceeded in such desultory fashion. Perhaps it was because IRCA was itself a monopoly, armed with a judicial decree on rates, that it assumed a position of power which it did not really possess. Great empires have been lost, and probably will be again, through miscalculation of one's own strength or adversary's weakness. I realize that the plaintiff can hardly be expected to adduce direct evidence on intention, even by way of binding contemporaneous memoranda and that it must rely largely on circumstantial evidence. I have taken that into consideration in evaluating the evidence and sought inferences from such evidence as far as I conscientiously could, in favor of the plaintiff. On the other hand, the burden of establishing its case by a preponderance of the evidence rests on the plaintiff.

I have concluded that the plaintiff has failed to sustain that burden. The findings of fact establish that; but I think it may be appropriate to suggest the broad elements of that conclusion, perhaps somewhat discursively.

I recognize that it is possible that all the testimony and documentary evidence presented by the defendants in support of their position that Tiquisate was closed for legitimate business reasons could have been for the purpose of fabricating a fictitious excuse for the ultimate decision, as the plaintiff appears to contend. I

must say, however, that I was impressed with the sincerity of Mr. Sunderland and the other UF witnesses. They testified lucidly about the difficult problems they were facing in the 1959 - 1964 periods, difficulties which arose independently of the Ripley lawsuit. In general, I credit their testimony as supporting the legitimate motive in abandoning the Tiquisate operation in favor of other operations in other countries and in Eastern Guatemala.

Enough has been shown about the hazards of banana growing in the tropics to enable the court to follow the course of decision taken by Sunderland and his board. By way of general synopsis, I have found that the very period which coincided with the affirmance of the Ripley judgment ushered in a new era in banana cultivation. In essence, the struggle was against the forces of nature rather than against the Ripley court.

The conventional banana was the Gros Michel which had been devastated by Panama disease and blowdowns (because of the height of the plant, making it more susceptible to wind damage). Sunderland, faced with a natural crisis, ordered detailed agronomic and financial studies to be made. If these studies coincided roughly with the affirmance of the Ripley judgment, they also coincided with the new presidency of Sunderland.

These studies showed that the solution was the development of a banana that would be resistant to Panama disease and would also grow shorter and be less susceptible to tropical windstorms. Ultimately, such a plant was successfully developed. It was called the Valery banana. The basic weaknesses

were small compared to its strengths. It was thin-skinned and had to be boxed before being transported. There was some doubt whether it could withstand long hauls up mountains and down valleys.

A significant counter-strength of the Valery was that it required less land for its cultivation than did the Gros Michel. This, in turn, led to the logical question of whether UF had too much land for present need, and, if so, in what areas should land be sold.

A sharp controversy has arisen between the parties on this question. UF has presented a mass of agronomic and financial evidence to establish that Tiquisate was a logical area to drop when the Valery banana came to the rescue of the Company because it was the worst of all UF's company-owned divisions in which to produce the Valery bananas. The Company also dropped other areas (Tr. 802, 869-70). Of the 1.36 million acres owned by the Company at the end of 1961, approximately one-third, or 422,701 acres were authorized for sale and disposal in twelve divisions (DX 530).

Aside from the agronomic and financial reasons, I also credit the political reason given, that the political climate in Guatemala was bad, and that if land had to be disposed of, it would be safer not to have two major divisions, Eastern Guatemala and Western Guatemala, in that same country.

The plaintiff urges that it can be shown objectively that Tiquisate was not the worst division for growing the Valery. It has developed figures on landed cost to U.S. Gulf ports for boxed bananas. Its assumptions on the decreased costs for boxed bananas were challenged by Mr. Fox, the UF executive vice-president. But assuming that

plaintiff's landed cost figures were accurate, there is no showing that Sunderland knew this, agreed with it, or had reason to doubt the Miller Report which showed Tiquisate to be the worst division. The plaintiff, to prevail on the issue of intent, would have to convince the court that the Miller Report and the other reports were contrived to reach a result. I am not conviced of that, I think the testimony concerning action taken on the basis of the reports was straightforward.

We are not in a situation where the objectively best division was reported as the worst. In short, I find no accumulation of circumstantial evidence preponderant enough to overcome the testimony and exhibits supporting the actions concerning Tiquisate as motivated by legitimate need and not by the Ripley judgment alone.

If the dominant purpose of UF had been to eliminate competition, it is paradoxical that its successive step decisions to abandon Tiquisate growing came mostly after its only competitor, Standard, left Guatemala in November, 1961. CAG did not get below about 50,000 acres of banana land until October 23, 1962 when it authorized the sale of 28,104 acres. This was about a year after Standard had left the country, apparently forever.

The Managers' Conference of September 4 and 5, 1962, was when it was decided to "phase out" the Tiquisate operation. This was almost a year after Standard left.

One must conclude that in seeking a lower rate for banana shipments, UF was not seeking a rate that was discriminatory, for there was no longer any actual competitor to discriminate against.

The next contention of the plaintiff, as I understood it, was that in selling

the Tiquisate land, UF deliberately restricted it from future banana cultivation, for the purpose of limiting its banana competition and as reprisal against IRCA. In denying summary judgment I wanted to give plaintiff a chance to prove these allegations. It has failed to do so, although its able counsel has been most ingenious in his efforts to do so.

Having determined that the closing of Tiquisate was legitimately motivated, we next come to the question of whether in the disposal of the land it acted in furtherance of monopolization. I leave to one side the question of whether UF by the 1960's was a monopoly or close to a monopoly, and assume, for the moment, that it was.

The first question is whether, in the deeds given to purchasers there was a restrictive covenant prohibiting the use of the land for banana cultivation. There was no general policy, although there were a few leases with such restriction. Second, were good faith efforts made to sell the land for banana cultivation? I find that the buyer's market was very small for the following reasons. The logical buyer, if, indeed, it wanted to go back to Western Guatemala, after its blowdown experience of 1961, was Standard Fruit. But that was the one buyer, UF's largest competitor, to whom UF was not permitted under the Consent Decree to sell divested land. The Government of Guatemala was not enthusiastic about bananas as the staple of its agriculture, as evidenced by the circumstance that it had ceased the cultivation of the 100,000 acres of banana land that UF had ceded to it some years before. This policy also tended to eliminate small landowners

who could not count on Government support, which was more directed to the growing of cotton. Other active competitors in the banana business were in fact approached, and registered either lack of interest for agronomic reasons or because of a lack of capital to finance the large operation.

Finally, the plaintiff rests its principal argument that UF could have preserved Tiquisate as banana growing land on the suggestion that it could have made a deal with Roy O. Chalk, an entrepreneur, who in 1963 controlled IRCA. It is a popular adage that it takes two to tango. I find that Chalk was a reluctant dancing partner.

If there had been an offer from Chalk which the court could have found reasonable, there might have been an objective finding that a rejection by UF was ulterior in motive. Or if there had been affirmative misrepresentations to Chalk, such as one finds in a Section 10(b)(5) case, the same result might have been reached.

The difficulty here was that Chalk, for his own good and no doubt honest reasons, was slippery in the negotiations. He wanted to buy cheap and that was his privilege. UF might, indeed, have been expected to bend a little to save the banana growing business, but the question is how much is enough. What Chalk wanted I find was unreasonable. Assuming that he was sincerely interested in making a deal, which one will never know, he apparently wanted to buy the Tiquisate land at $100 an acre (the upset price), get the equipment and plant for nothing, and buy it as a divestiture under the consent decree which would also require UF to sell him the appurtenances needed for a going business including a steamship fleet worth $5 million. He did

not come up either with a total price or a means of independent financing. Under the antitrust consent decree it is doubtful whether the Department of Justice would have permitted UF to divest under the decree by taking back a substantial purchase money mortgage.

I find that the Chalk deal was remote rather than close and that the deterioration of the Chalk negotiations, as indicated by the findings of fact, were not the result of foot-dragging by UF.

Once the decision to close down Tiquisate was made it would have been quixotic to hold the land for a longer time in the extremely remote hope that someone would appear as a purchaser for banana cultivation.

Yet, there is the last argument that, even if UF was not discriminating against the American public by monopolization or against Standard and other competitors, it still intended simply to break IRCA in reprisal for Ripley.

On the facts, we have seen that predominant legitimate motives prompted the liquidation of Tiquisate. The motive of reprisal is, thus, contra-indicated. But since the plaintiff presses the point, though he has failed to prove it, perhaps another word should be said on the question of a singleminded intent to destroy IRCA.

I wonder what motive a businessman would have to destroy another business which was not a competitor when he had not even the intention to go back to that market after the victim's body was buried. Revenge, in the pure form suggested by counsel for the plaintiff, is not in the vocabulary of business. While Adam Smith and Ricardo may have oversimplified things,

it is still a truism that business corporations are economic animals with a lust for profit. It is a large assumption, indeed, that they would be subject to the petty revenges of princelings. To drive even a competitor out of business would mean that the driver hoped at least to move toward a monopoly market after the debacle. To destroy a railroad just to hurt it is hardly a game played by sane men. It would be something like the act of kicking an inanimate object after one has stumbled over it. (See Holmes, The Common Law, pp. 11-12).

In substance, then, I find that the plaintiff has failed to prove its antitrust claims under the Third Claim, the findings leading to the conclusion having been detailed in the Findings of Fact filed herewith.

Sixth Claim: Clayton Act § 7

The plaintiff contends that the acquisition of stock by UF in IRCA in 1928 and 1936 was in violation of Section 7 of the Clayton Act and that its effect was to restrain commerce to the injury of IRCA.[11/]

There is no doubt that a vertical acquisition, as well as a horizontal acquisition, may violate Section 7. United States v. E. I. DuPont de Nemours & Co., 353 U.S. 586 (1957). It is also settled that money damages as well as injunctive relief may be predicated on a Section 7 violation. Gottesman v. General Motors Corp., 414 F.2d 956, 960-61 (2 Cir. 1969). The difficulty here is that Section 7 speaks principally to the future. It was intended largely to nip in the bud incipient dangers of lessening competition, restraint of commerce or a tendency to monopoly.

This action was brought thirty-seven years after the original stock acquisition. And while impact within the period of limitations is enough to invoke jurisdiction, the threat of competition is measured at the time of suit. United States v. E. I. DuPont de Nemours & Co., supra, 353 U.S. at 607. This action was begun in 1965. UF had already sold its stock in 1962. At the time of the suit there was no possibility of a tendency to limit competition or to monopolize by reason of the stock acquisition.

General Conclusions

In the opinion denying summary judgment for the defendants I noted that "we must assume on this motion that until all the facts are in, we cannot determine whether policy based on precedent will support the standing of the plaintiff to sue." 358 F.Supp. at 1373.

The facts are now all in. In determining the motion for summary judgment, the Court concentrated on whether acts committed after the statutory period as determined by the Court of Appeals, 373 F.2d 408, could give the plaintiff standing to sue for the alleged antitrust violations. In view of the limitations period set by the appellate court, neither side pressed strongly the question of whether there were acts committed before the statutory period which caused injury within the statutory period. It was not important to consider this question separately since summary judgment was denied in any event. The decision turned on whether standing could be denied on summary judgment. The issue of proximate cause was considered only in relation to standing. The plaintiff did not rely on Zenith Radio Corp. v. Hazeltine Research, Inc., supra,

in support of a claim of antitrust violations in an early pre-statutory period that would support injury in the statutory period.

It does so now. Plaintiff now contends that antitrust violations occurred before February 1961, but which were not sufficiently clear as future damages to permit proof of such damages except within the statutory period.

The theory apparently is that no matter how far back the act of injury goes, it is redressible if its effect lasted into the statutory period. While, at first blush, this would seem to negate the intention of Congress in creating a four year statute of limitations for antitrust violations, the Supreme Court did carve an exception in Zenith, supra, for a situation where the future damages were not calculable when the violation occurred, excluding such damages from the bar of the statute of limitations. It is not clear how far the Court will go in situations going beyond the facts in Zenith, where the conspiracy actually continued into the statutory period.

Assuming, arguendo, that the changes wrought by the Government consent decree of 1958 and the Ripley judgments would not, even if they caused a prior conspiracy to stop, prevent the Zenith rule from applying, we must turn to whether there were antitrust violations prior to the statutory period, whether such violations, if found to exist, proximately caused the later injury in the legal sense, and whether they gave the plaintiff standing to sue (a point reserved in my earlier decision).

The Court of Appeals in sustaining the partial defense of the statute of limitations in this case said:

> "But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill. Moreover, the statute of limitations itself embodies a strong policy 'to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.' Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF." 373 F.2d at 416. (footnotes omitted).

Judge Friendly was, of course, not thinking of the Zenith exception for that had yet not come down. But in analyzing the Zenith exception considerations of policy may distinguish between the continuous conspiracy, as in Zenith, and the alleged conspiracy which had become a matter of history by the time the statutory period began.

The plaintiff contends that the contracts between IRCA and UF were of a continuing nature, that earlier contract pressures were antitrust violations, and that certain future effects were not provable until they happened.

The essence of the claimed antitrust violations is that IRCA was harmed because it was forced to operate under conditions that discouraged competitors of UF, who would have been shippers on the railroad, from growing bananas in Guatemala.

I must find that the plaintiff has failed to carry its burden of proof. One large competitor of UF, Standard, did come into Guatemala, and left, so far as the unrefuted evidence shows, only because a "blow-down" destroyed its plantations in 1961.

The plaintiff has not shown that there ever was a single other potential competitor who indicated an interest in Guatemalan banana growing to the point of approaching IRCA to see what arrangements for shipping could be made. Nor has the plaintiff adduced any evidence that there were potential competitors who had the rather large financial means required to enter into competition with UF in growing bananas in Guatemala. See Stearns v. Tinker & Rasor, 252 F.2d 589, 606 (9th Cir. 1957). 12/

An antitrust claim requires more than a theory. It is noteworthy that not only was no evidence adduced to prove the foregoing, but no official of Standard was deposed or brought to testify for the plaintiff at the trial, nor were any potential competitors deposed to prove their ability to go into Guatemala and their unwillingness to do so because of alleged restraints of trade by UF.

As a result, the claim of injury because of conspiracy or monopolization has not been shown to be the cause, proximate or substantial, of actual injury to IRCA. To the extent that UF paid less freight charges than it should have, that was a matter of breach of fiduciary duty and has been recompensed by the Ripley judgments. The absence of proof of direct harm to competitors of UF makes a fortiori the absence of proof of indirect harm to IRCA itself.

It is necessary for a plaintiff to prove that the acts claimed to be in violation of the antitrust laws caused damage, in this instance, actually kept potential shippers out of Guatemala. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931); Salerno v. American League, 429 F.2d 1003, 1004 (2 Cir. 1970), cert. denied, 400 U.S. 1001 (1971); Bendix Corp. v. Balax, Inc., 471 F.2d 149, 163 (7 Cir. 1972). And such proof must show a clear causal connection by a preponderance of the evidence. Ansul Company v. Uniroyal, Inc., 306 F. Supp. 541, 567 (S.D.N.Y. 1969) (Mansfield, J.), aff'd in pertinent part, 448 F.2d 872 (2 Cir. 1971), cert. denied, 404 U.S. 1018 (1972).

No matter how sympathetic a court may be to a plaintiff as a "private attorney general," "it is uniformly held that liberality may be used in estimating the amount of damages after it has been shown that they were caused by acts contrary to the antitrust statutes, but that this liberality does not extend to proof that the damages were caused by the illegal acts." M.O. Dantzler v. Dictograph Products, Inc., 309 F.2d 326, 330 (4 Cir. 1962), cert. denied, 372 U.S. 970 (1963).

Here, the "causative link" has not been proved. Seee Billy Baxter Inc. v. Coca-Cola Co., 431 F.2d 183, 187 (2 Cir. 1970), cert. denied, 401 U.S. 923 (1971); Kinzler v. N.Y. Stock Exchange, 62 F.R.D. 196, 200-01 (S.D.N.Y. 1974). Accordingly, the Zenith rule simply does not come into play.

The failure of proof of any injury from antitrust violation makes academic a discussion of standing. But since so much effort was devoted to the question by the parties and by the court on the summary judgment motion perhaps some statement is in order.

In the summary judgment opinion I limited the discussion of standing to the limitations period -- following February 16, 1961 I treated the gravamen of the claim that survived the limitations defense as the allegation that in the abandonment of Tiquisate, IRCA had become a prime target as a reprisal for the enforcement of the Ripley judgment. Since the Zenith question had not been raised I did not discuss standing before the limitations period, and reserved the entire issue of standing for decision after trial. 358 F. Supp. 1363, 1373.

In view of the outcome of the trial there is no need to decide specifically whether IRCA had standing to sue. Considering the complexity of the problem applied to these particular facts, it is better to leave further discussion of standing for another time.

While in the light of this decision it is not strictly necessary, I find as an alternative ground that the plaintiff has failed to prove that the loss of its property to the Guatemalan Government and its effective ouster from that country were substantially caused by the acts of UF.

The record shows abundantly that over the years the Guatemalan Government and the labor unions together caused IRCA to come upon evil days unrelated to the activities of UF.

Unfortunately for the IRCA stockholders the record is quite clear that its financial troubles come from other sources than UF.

IRCA prospered through 1957. It was the only means of transportation from the Atlantic Ocean at Puerto Barrios to Guatemala City. The communists took over in the regime of President Arbenz from 1951 to 1954, and IRCA became the target of nationalist attacks. During that period, highway construction began which ultimately parallelled the railroad routes and subjected the railroad to disastrous truck competition.

In 1955, the government opened its own modern port at Mateas de Galvez to compete with Puerto Barrios. The new government port became the eastern terminus for the government's new highway. IRCA was denied permission to build a spur line to the new port, which also discriminated in port charges to its own benefit. Certain goods, by Government decree, were required to be shipped through the government port.

In 1958, the railroad had serious union difficulties. Over the years, those serious labor difficulties continued. On January 3, 1968, the union started a strike because of IRCA's failure to pay a Christmas bonus in a loss year. The Government made a loan to the railroad far below its minimum capital requirements, and when the railroad was unable to meet the rigorous loan conditions, the Government foreclosed and took over the railroad in January, 1969. (PX 245).

It cannot be gainsaid that the people who bought the IRCA stock and now control it

were quite familiar with the dangers involved. Judge Friendly noted in 1967 that "68% of the common stock of IRCA is owned by a recent purchaser,"373 F.2d at 416, n.13. These purchasers must have known that elements presaging a debacle were present and that these elements were neither caused nor controlled by UF from whose ownership their IRCA stock derived.13/

The Contract Claim

In the summary judgment opinion I noted that the plaintiff contends that the contract required CAG to ship substantial quantities of bananas for the life of the contract. I ruled that the contract expired January 1, 1963. I noted that the issue of whether CAG had an obligation to ship any particular volume was determined adversely to the plaintiffs' contentions by the Referee in Ripley, 358 F. Supp. at 1376.

It was therefore held that there was a collateral estoppel on the issue, relying in part on the New York doctrine that collateral estoppel will be applied when there has been a "free and fair opportunity" to litigate the issue. See Schwartz v. Public Administrator, 24 N.Y.2d 65 (1969).

At trial particular findings of the Referee in Ripley were admitted in evidence on the issue of collaterial estoppel.

Thus, the Referee found that "IRCA undertook to transport all bananas tendered by CAG for transportation to Barrios from Western Guatemala with no corresponding obligation on CAG to ship any given amount of bananas over IRCA at the rates specified in the contracts." (D 101-G); PX 14, 15.

The Referee found that "IRCA was obligated to transport promptly all bananas

tendered by United on the Pacific side; no obligation was imposed on United to ship any such bananas." B 360(d).

In the summary judgment opinion I held that there was collateral estoppel on the point that CAG had no obligation to ship any quantity of bananas. I concluded that the issue was open for independent consideration only for the years not covered by the Ripley supplemental judgment, the period following December 31, 1960. 358 F. Supp. at 1377.

Upon careful review I have concluded that my ruling was erroneous. The acceptance of the Ripley findings as collateral estoppel should not have been limited to the period before 1961. Since the Ripley finding that there was no obligation to ship on CAG's part related to a contract that did not expire until January 1, 1963, the interpretation was binding to the end of the contract.

I did note in the earlier opinion:

> "It is apparent, therefore, that any claim of breach of contract involving failure to ship bananas in volume as distinguished from the antitrust claim that arose before December 1960 could have been litigated in the State Court. Any claim of loss because of an allegedly insufficient volume was available as an item of damage." 358 F.Supp. at 1377.

The Ripley finding that there was no obligation to ship disposed of any right to damages. If the contract was unconscionable as a breach of fiduciary duty, that was fully litigated in the State Court. If treated as a simple breach of contract,

the Ripley finding precludes a subsequent finding, on the same contract, of an implied covenant to continue to ship. The issue may not be relitigated.

Even if it were relitigated I would be constrained to find as the Ripley court, did, that, since there was no obligation there was no breach up to 1961.

The complaint against CAG alleges that defendant breached its contract "by ceasing all shipments of bananas in or about August 1964." 358 F. Supp. at 1373. Since this Court has ruled that the contract terminated January 1, 1963, the actual cessation of shipments because of the closing of Tiquisate after the contract had ended has no legal significance.

So far as the claim that gradual abandonment of Tiquisate was a breach of contract is concerned, I find that no corporate decision to close Tiquisate was taken during the years 1961 and 1962. There is evidence, which I credit, that in 1961, Mr. Sunderland on the basis of a cash flow report decided to continue Tiquisate operations at least through 1962 (DX 222; Tr. 757). The recommendation to close Tiquisate did not come until after August 5, 1963 when a Carpenter memorandum stated why Tiquisate had become unprofitable and predicted a poor future. (DX 341; Tr. 800-02, 867-70).

There is credible evidence that maintenance of Tiquisate was kept up during the 1961-1963 period (DX 499, pp. 1-2, 14) and that the cultivations were maintained by cleaning, pruning and nitrogen fertilization, as well as aerial spraying. (DX 500, pp. 2-3).

I also find that the reduction in carloads shipped from Tiquisate from 13,693 in 1961 to 7,305 in 1962 was largely

attributable to Panama disease and blowdowns, including the big November, 1961 hurricane (Tr. 1244-45; DX 227). Stems shipped in 1961 were about 3.3 million, and in 1962, about 2 million. The difference of 1.3 million stems is attributable to a variety of factors. The stems shipped per acre in 1962 were less than in 1961, largely because of blowdowns (DX 548). There were 208 stems per acre lost by blowdown in 1962, compared with 151 in 1961. There was also a reduction in average acreage in bearing from 16,557 acres in 1961 to 14,289 in 1962. This reduction was due largely to Panama disease and to a lesser extent to blowdowns.

Accordingly while I refused to grant summary judgment on the question of whether a gradual abandonment might legally be equivalent to an unlawful cessation of business, I find, after trial, that the plaintiff has not proved that the reduction in shipments was substantially caused by other than agronomic factors.

For all the foregoing reasons, the complaint is dismissed. Judgment will be entered for the defendants. 14/

Dated: JAN 29 1975

MURRAY I. GURFEIN

MURRAY I. GURFEIN, U.S. Circuit Judge
Sitting by Designation

F O O T N O T E S

1. This opinion should be read in conjunction with the earlier opinion. The court also rendered a decision dated April 25, 1974, admitting in evidence certain findings of fact in the Ripley case and holding that they had a collateral estoppel effect as of December 31, 1955.

2. While the action against CAG was consolidated, it did not appear by separate counsel or offer any proof on its own behalf.

3. The Ripley court found that IRCA was under the practical control of United at least to 1955. This finding is accepted as collateral estoppel (issue preclusion). But its effect here does not go beyond 1955, more than five years before the statutory recovery period begins.

4. UF sold substantially all its IRCA stock to BSF Company which sold the great bulk of it to Trans Caribbean Airways, controlled by Roy O. Chalk. Trans Caribbean bought more stock so that it owned 340,000 of IRCA's 500,000 shares of Common. This block was later sold by Trans Caribbean to one Yaeger who became Chairman of the IRCA board and who retained present counsel to plaintiff.

5. Ripley v. Intl. Ry. of Cent. Am. & UF, 8 A.D. 2d 310, aff'd, 8 N.Y.2d 430 (1960).

6. February 16, 1961 is an important date. On that day McGovern, the sole representative of UF on the IRCA Board died, and Sunderland of United advised the IRCA Directors that UF would not nominate anyone to the IRCA Board.

February 16, 1961 also became the date on which the statute of limitations ran on the antitrust claims, because this federal action was filed on February 16, 1965, exactly four years later.

7. The finding related to the claim of plaintiff that the Statute of Limitations had been tolled because the potential defendant controlled the IRCA Board.

As early as July, 1957 after Judge Hammer's decision in Ripley, UF sought to have IRCA call a special meeting of its stockholders to modify the contracts, but apparently IRCA was, by then, independent enough to refuse UF's request, and the meeting was not called.

8. The specific section of the contracts with IRCA which prohibited IRCA from encouraging competition with UF was eliminated under the Consent Decree. (DX 73-DX 75).

9. The parties have favored the court with over 1,000 pages of argumentative briefs plus proposed findings. They will be referred to as follows: P's memo of law --P.M.; D's post-trial brief--D. Br.; P's Answering Memo--PAM; D's response--D.R.; P's Memo Reply--PMR; D's Reply Brief--D.R.B.

10. Judge Friendly had noted: "Moreover, the second claim may have scant practical application to that relatively recent period [after February 16, 1961] in view of the provisions for rate increases in the Ripley judgment." 373 F.2d at 417.

11. Section 7 (15 U.S.C. § 18) provided in pertinent part, prior to 1950:

"Sec. 7: That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."

In 1950, it was amended to read as follows (15 U.S.C.A. § 18):

"No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce,

where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

12. Plaintiff's reliance on the entry of independent banana importers into Ecuador is not convincing. In Ecuador a banana company could buy bananas without the large investment involved in growing them.

13. There are a number of sharply contested legal issues which the court has assumed, but only arguendo, in favor of the plaintiff. These include plaintiff's claims that (1) the relevant market under the Sherman Act is the "service of transportation of bananas from the western side of Guatemala to Puerto Barrios on the Atlantic side for shipment to the United States" (P. Br. 21); (2) that UF and CAG come within the intercorporate conspiracy

doctrine; (3) that IRCA, the acquired company was "engaged in commerce" under Section 7 of the Clayton Act. See Gulf Oil Corp. v. Copp Paving Co., Inc., ___ U.S. ___; 43 U.S.L.W. 4059 (Dec. 17, 1974).

In view of the factual and legal determinations after trial in favor of the defendants, it is unnecessary to decide the foregoing legal questions.

14. The detailed findings of fact and conclusions of law pursuant to F.R. Civ. P. 52(a) are filed in the office of the Clerk of the District Court for the Southern District of New York. To the extent that findings in this opinion are in addition to such findings they may be deemed to be incorporated in the formal findings. In the accompanying opinion United Fruit is designated as "UF" to conform with the earlier nomenclature used by the Second Circuit and by the District Court on the summary judgment motion. In the findings of fact United Fruit is referred to as "United" to follow the designation used by all parties in their respective proposed findings.

BEST COPY AVAILABLE

INTERNATIONAL RAILWAYS OF CENTRAL AMERICA, Plaintiff-Appellant,

v.

UNITED FRUIT COMPANY, Defendant-Appellee.

No. 178, Docket 30833.

United States Court of Appeals
Second Circuit.

Argued Nov. 29, 1966.

Decided Jan. 27, 1967.

Railroad company brought action in February 1965 against fruit company, which had dominated the railroad company, for treble damages under antitrust laws going back to 1928 and for other relief. The United States District Court for the Southern District of New York, Sylvester J. Ryan, J., 254 F.Supp. 233, granted a motion for partial summary judgment by the fruit company and denied such a motion by the railroad company, and both appealed. The Court of Appeals, Friendly, Circuit Judge, held that while odds might have been against likelihood that board of directors of railroad company, which was dominated by fruit company, would have authorized antitrust action against fruit company between May 1959 and February 1961, but possibility of authorization of antitrust action could by no means be dismissed as negligible, any tolling of statute of limitations because of domination of railroad by first company had ceased by February 1961 since railroad had not borne burden of showing that board of directors as reconstituted in 1959 would not have authorized corporate suit.

Judgment affirmed in part and reversed in part.

1. Limitation of Actions ⇨195(3)

Plaintiff, who seeks to toll statute of limitations on basis of domination of corporation, has burden of showing full, complete, and exclusive control in directors or officers charged.

2. Limitation of Actions ⇨101½

While odds might have been against likelihood that plaintiff corporation's board of directors would have authorized antitrust action against plaintiff's controlling shareholder, the possibility cannot be dismissed as negligible since one-third of the board would seem to have been highly responsive to a shareholder's demand, the past board had recently been vigorously excoriated for their inaction by a referee in a related state action, the controlling corporation had been ordered to divest their holdings in plaintiff in a government antitrust suit, and the board must have been aware of the legal implications of arbitrary refusal to bring an apparently justified suit; thus statute of limitations for plaintiff's antitrust action against controlling shareholder was not tolled on basis of defendant's domination of plaintiff. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

3. Judgment ⇨592

Fact that successful state court derivative action for breach of fiduciary

duty for period from 1943 to 1960 was brought on behalf of corporation now bringing Clayton Act suit for period beginning in 1961 against same defendant does not bar latter suit on ground of splitting cause of action. Clayton Act, § 4B, 15 U.S.C.A. § 15b.

Aaron Lewittes, New York City (Leventritt, Bush, Lewittes & Bender, New York City) (M. Victor Leventritt, Sidney Bender, Abraham K. Weber, New York City, of counsel), for plaintiff-appellant.

Ralph M. Carson, New York City (Davis, Polk, Wardwell, Sunderland & Kiendl, New York City) (Porter R. Chandler, Robert F. Dobbin, New York City, of counsel), for defendant-appellee.

Before LUMBARD, Chief Judge, and FRIENDLY and SMITH, Circuit Judges.

FRIENDLY, Circuit Judge:

This action was brought on February 16, 1965, by International Railways of Central America (IRCA) against United Fruit Company (UF) in the District Court for the Southern District of New York. The complaint, analyzed in more detail below, asserted six claims, the first four and the sixth seeking treble damages for breach of the antitrust laws, 15 U.S.C. § 15, and the fifth, predicated on the same facts as the third, primarily seeking damages for breach of contract. The asserted damages, going back in some instances to 1928, when trebled were in excess of a half billion dollars.

UF moved for summary judgment (1) dismissing the first, second, fourth and sixth claims and so much of the third and fifth as related to matters occurring before 1961, on the ground that their prosecution was barred by the final judgment awarding damages through December 31, 1960, in a derivative action brought in the New York courts by stockholders of IRCA (hereafter "the *Ripley* action") against that company as a nominal and UF as the real defendant; and (2) dismissing so much of the claims (other than the fifth insofar as it was based on alleged breach of contract) as related to matters occurring before February 16, 1961, as barred by the four-year statute of limitations for antitrust actions, 15 U.S.C. § 15b. Plaintiff countered with a motion for partial summary judgment as to UF's liability on the first, second, fourth and sixth claims and also as to damages on the second and sixth, mainly on the basis of the record and judgment in the *Ripley* action. Judge Ryan granted both branches of UF's motion and denied plaintiff's, 254 F.Supp. 233 (1966). A judgment was entered which made the recitals appropriate under Rule 54 with respect to the grant of defendant's motion and contained certification under 28 U.S.C. § 1292(b); we granted leave to appeal so that the entire matter might be before us.

I.

A statement, necessarily condensed, of the relations of the parties and of previous litigation is essential to understanding. For the former we draw largely on the findings made by the referee in the *Ripley* action in 1957, which were affirmed by the hierarchy of New York courts.

IRCA operates the most important railroad in Guatemala, running across the country from Puerto Barrios on the Caribbean, the principal seaport, with one branch veering southward into El Salvador and another extending from western Guatemala north to the Mexican border. From its incorporation in 1904, IRCA's fortunes were closely linked to UF's banana business in Guatemala, initially in the east. The importance of the two companies to each other increased when, in the 1920's, UF became convinced of the desirability of expanding its plantations around Tiquisate in western Guatemala.

In 1928 a syndicate including UF and banking firms purchased the interest of IRCA's dominant shareholder, Minor C. Keith, this making UF, with 71,000 shares of common stock, the largest single shareholder. The stock purchased by the syndicate was placed in a voting trust under which UF, through a trust company as its agent, nominated two of the five trustees. In fact UF took over control of IRCA, although its stock ownership was concealed. By the mid-1930's its interest in western Guatemala and consequently in IRCA increased; its new president, Zemurray, made known that UF would pursue its development plans only if its control of IRCA was solidified, for the double purpose of insuring continuation of the favorable freight rates and service on its own products and of preventing similarly favorable rates to competitors. In 1936, Compania Agricola de Guatemala, S. A. (Agricola), a wholly owned subsidiary of UF, acquired 185,000 shares of unissued IRCA common stock at a low price and the voting trust was dissolved. UF's 256,000 common shares then constituted 42.68% of IRCA's total voting stock, 500,000 shares of common and 100,000 of preferred. At the same time contracts relating to rates and many other matters were executed.

From this time UF could and did control the election of IRCA's nine directors, although it regularly allowed the banking interests to submit four nominees for its approval. UF's control was exercised even more potently by the designation, from 1928 on, of the officer in charge of its tropical operations as "special adviser" to IRCA's board, chairman and president. For many years, the extent of UF's stock ownership and dominance of IRCA was concealed.

As indicated, UF's most important interest in IRCA was in having low freight rates and special services for its own products and in denying these to its competitors. On banana shipments from western Guatemala, UF for many years paid only $60 per car, performing the wharfage service and loading at Barrios with its own labor, whereas independents paid $130 per car for the line haul and about $72 for wharfage and loading, on which IRCA made a profit. For bananas from eastern Guatemala, UF was charged 11½ or 12 cents per stem as against 20 cents for independents. On imports through Barrios to western Guatemala IRCA charged the public $350 or more per carload as against $60, later $100, to UF. In numerous instances IRCA, at UF's instance, denied to independents services comparable to those furnished its controlling stockholder.

In May, 1948, meetings were held between an attorney representing IRCA stockholders, and the President and Chairman of the Board of IRCA, to consider IRCA-UF relations and rates. When the conferences proved unproductive, Ripley and other stockholders represented by the attorney brought a derivative action in the Supreme Court, New York County, in February, 1949. A year later the Appellate Division sustained the complaint except for such portions as related to matters occurring before February 4, 1943, which were held to be barred by the six-year statute of limitations. Ripley v. International Railways of Central America, 276 App.Div. 1006, 95 N.Y.S.2d 871 (1st Dept. 1950). After service of an amended complaint, denial of a motion challenging its sufficiency and extensive discovery, trial was begun in 1953 before Mr. Justice Hammer and, after his retirement, was continued before him as a referee.

In a long report and decision, filed in June, 1957, the referee concluded that plaintiffs had established a breach of fiduciary duty by UF. He fixed rates for the carriage of the bulk of UF's traffic at considerably more than what IRCA had collected but less than those charged to independents.[1] Although at the trial

1. For west coast bananas he directed that the $75 per car rate voluntarily made effective in January, 1948 should be applied retroactively to January 1, 1946, that the rate for 1948 should be $80, and that this should rise $5 annually through 1955. For east coast bananas he directed that the 15¼ cent per stem rate which had applied from 1929 to 1930 should be restored from 1943 through 1955. For import traffic he directed an increase of 10% per car for 1947 and for each year thereafter through 1955. As to other items, he found plaintiffs had not adequately proved damages. He expressed the opinion that "equity and fair dealing indicate, and no doubt would require, similar annual rateable increases" for the cross-country traffic "until the rates equal those fixed for the general

IRCA had opposed the plaintiffs and supported UF, because of fear that judgment for the plaintiffs might enable UF to terminate the complex of contracts executed in 1936, the referee's conclusion as to the severability of the rate arrangements led it to join plaintiffs in appealing on the ground that the award of damages was inadequate. The Appellate Division rejected this argument as it did the many grounds urged by UF for reversing the award to IRCA, Ripley v. International Railways of Central America, 8 A.D.2d 310, 188 N.Y.S. 2d 62 (1st Dept. 1959), and the Court of Appeals affirmed, 8 N.Y.2d 430, 209 N. Y.S.2d 289, 171 N.E.2d 443 (1960). On March 1, 1961, the Supreme Court for New York County entered a supplemental judgment assessing damages for 1956–60 in the sum of $3,309,670.39, with interest.

In preparing for and conducting the trial of the *Ripley* action, an attorney for the plaintiff stockholders became aware of evidence which in his view demonstrated antitrust violations by UF, and mentioned this to a Justice Department attorney toward the end of 1951. In 1954, the United States filed a civil complaint under the antitrust laws against UF in the Eastern District of Louisiana. This action terminated early in 1958 in a consent decree, one section of which required UF to dispose of its IRCA stock not later than June 30, 1966. In January, 1962, UF sold substantially all such stock to BSF Company which in turn sold the great bulk of this to Trans Caribbean Airways: the latter has purchased additional stock so that it owns 340,000 of IRCA's 500,000 shares of common. Later, UF advised it was abandoning Tiquisate and would no longer ship bananas from western Guatemala over IRCA as the latter claimed it was bound to do through 1967. IRCA then sought the advice of attorneys who had been of counsel to the *Ripley* plaintiffs. This action followed, on February 16, 1965.

We conclude this history with a summary statement of the six claims in the complaint:

First: loss of revenues and permanent damage to IRCA from UF's repressive tactics which prevented other banana shippers from using IRCA, 1928–61, $75,000,000.

Second: utilizing IRCA to facilitate UF's monopolistic designs by granting it discriminatorily low rates, 1928–61, $55,000,000 less the principal paid on the state court judgment.

Third: restricting UF's own banana shipments over IRCA, 1949–64, and disposing of its banana plantations in the Tiquisate area for other uses beginning in 1961, $24,000,000.

Fourth: monopolization of water transportation of Guatemalan coffee to the United States on a basis whereby total charges via Barrios were equalized with those from west coast ports of Guatemala and whereby IRCA was forced to charge higher rates on coffee not using UF ships, depriving IRCA of higher rail revenues it could have obtained if there had been effective steamship competition, 1928–61, $15,000,000.

Fifth: breach of contract to ship west coast bananas (damages included in third claim).

Sixth: acquisition of control of IRCA by UF in violation of § 7 of the Clayton Act, 15 U.S.C. § 18 (damages equal to aggregate alleged in first four claims).

public, (or so called independent), shippers." The judgment entered December 19, 1957, translated these figures into dollar amounts aggregating $4,531,655.3[illegible], including interest, established rates from January 1, 1956, in accordance with the above, and contained an appropriate reservation of jurisdiction for the future.

The total damages asserted, which may well contain some duplications, amounted to $169,000,000 and, when trebled, to $507,000,000.

II.

We consider first the defense of the four-year statute of limitations for antitrust actions, 15 U.S.C. § 15b, which Judge Ryan sustained save as to the claim for breach of contract. IRCA asserts that the statute did not start to run on any of the antitrust claims until UF relinquished its domination in January, 1962, even though most of the facts had been spread on public records long before, and that the action, brought in February, 1965, was thus timely. UF responds that "domination" as a basis for tolling the statute with respect to an antitrust claim ceases to apply to a corporation once the facts giving rise to the action have become known to independent directors or stockholders since they can bring a derivative action for treble damages on the corporation's behalf, as held in Fanchon & Marco, Inc. v. Paramount Pictures, Inc., 202 F.2d 731, 36 A.L.R.2d 1336 (2 Cir. 1953). It contends that this condition was here met as to stockholders not later than the annual meeting in March, 1952, when, after a thorough and heated airing of many of the claims being advanced in *Ripley*, an opposition slate received some 204,000 votes as against 308,000 for the management and as to directors in 1959 when three "independent" directors were elected to the IRCA board.[2] Plaintiff, not disputing that sufficient knowledge of the claims existed long before 1961, replies that it would be anomalous to bar the corporation because of a stockholder's or director's failure to do what the former was not bound to do and what neither might be able to do. Pointing to the thirteen years of starvation diet for the stockholders' lawyers in the *Ripley* action, it stresses the serious practical obstacles to undertaking derivative litigation against a powerful defendant, particularly one controlling the corporation, without the sinews afforded by the corporate treasury.

The closest that the Supreme Court has come to dealing with this vexing problem is Curtis v. Connly, 257 U.S. 260, 42 S.Ct. 100, 66 L.Ed. 222 (1921). This was a suit in equity by the receiver of a national bank against former directors for losses sustained by the payment of dividends out of capital and by improper loans and investments. The suit was brought August 2, 1916, and the six defendants whose liability was at issue had resigned by early 1910. Mr. Justice Holmes considered the suit to have been brought "upon the common-law right of the bank to recover for acts that diminished its assets," 257 U.S. at 262, 42 S.Ct. at 100,[3] and accordingly treated the case as governed wholly by the Rhode Island statute of limitations without considering possibly more extensive federal principles. The applicable Rhode Island statute was for six years with a proviso that "[i]f any person, liable to an action by another, shall fraudulently, by actual misrepresentation, conceal from him the existence of the cause of such action, said cause of action shall be deemed to accrue against the person so liable therefor, at the time when the person entitled to sue thereon

2. The three, Cunningham, Ruckle and Yaeger, were elected May 27, 1959, and remained as directors until 1963. Ruckle, a New Jersey automobile dealer who had owned a substantial amount of IRCA stock since 1951, was invited by McGovern of UF to have his name on the management slate for 1959; so apparently was Cunningham. The record does not show the circumstances as to the nomination and election of Yaeger who had been on the opposition slate at the stockholders' meeting of 1952; however, in view of the absence of cumulative voting, it is inferable that he too was on the "management" slate even though known to be hostile to UF.

3. We are not clear why this was so, since the bill apparently alleged acts constituting federal claims under Rev.Stat. § 5239, see the decision of the District Court, Curtis v. Metcalf, 259 F. 961, 963 (D.R.I. 1919), and Cheelbrough v. Woodworth, 241 U.S. 72, 78-79, 37 S.Ct. 579, 61 L.Ed. 1000 (1917), but we take the opinion as we find it.

shall first discover its existence." The somewhat anthropomorphic view that "The bank, of course, must be charged with knowledge of what appeared upon its books," 257 U.S. at 262–263, 42 S.Ct. at 101, disposed of the claims of concealment of illegal investments and, apparently, also of illegal dividends. The only point further discussed was the carrying of loans on the books at inflated values, as to which the "bank" itself would not perceive the error since the entries tallied with the amount of the loans and the concealment was simply the weakness of the borrower's credit. As to this, notice was found in the election of three new directors between 1909 and early 1910 who came to the board, admittedly with knowledge of the facts, "as the eyes of the bank." 257 U.S. at 264, 42 S.Ct. at 101. The Supreme Court's opinion did not discuss, although those in the lower courts had, "the contention made, not with much apparent confidence, that the statute did not begin to run in favor of the retiring directors until the bank passed into the control of a board, the majority of whom had not participated in the wrongs alleged against the retiring members * * *." Curtis v. Connly, 264 F. 650, 652–653 (1 Cir. 1920); see also Curtis v. Metcalf, 259 F. 961, 964–966 (D.R.I.1919). Examination of the briefs in the Supreme Court discloses that the appellant's argument on this score went not to domination as such but rather to knowledge. "Three-fifteenths of a board of directors," it was urged, "is not enough to make their knowledge tantamount to knowledge by the bank." Although the domination issue thus was raised by the facts, the Supreme Court seems not truly to have focused upon it; and while the decision must be taken into account, we do not consider it nearly so conclusive in defendant's favor as did the district judge.

The three precedents in this Court that have been cited to us [4] do not assist decision much further. In Michelsen v. Penney, 135 F.2d 409, 415 (2 Cir. 1943), an action by depositors and a receiver of a national bank against directors, we said that "the statute is tolled while a corporate plaintiff continues under the domination of the wrongdoers", and found that to be true until the receiver's appointment. But the directors other than Penney were "legally unqualified dummy directors," see 41 F.Supp. 603, 610 (S.D. N.Y.1941), and it was for that reason that the court, shifting at this point to a theory of concealment, concluded that "notice should not be imputed to the bank, because all these new directors were elected by the controlling Penney group, many of them were lent qualifying shares by this group, and none of them were independent in any real sense." 135 F.2d at 416, n. 2. In Austrian v. Williams, 103 F.Supp. 64 (S.D.N.Y.1952), an action by the reorganization trustee of Central States Electric Corporation against directors and others, Judge Weinfeld found that Williams' domination of Central States, as to which see his review of the facts, 103 F.Supp. at 71–75, "was so pervasive that it effectively prevented the proper institution of actions against him and the directors liable with him." Id. at 115. Since this sentence was followed by the statement, "The nature and extent of the domination was such as effectively to conceal by its very existence the significant facts of the transactions under attack", it is not clear whether Williams' domination alone would have been considered enough under the circumstances, and this court's view as to the inapplicability of federal principles made it unnecessary to resolve that issue here. Austrian v. Williams, 198 F.2d 697, 700–702 (2 Cir.), cert. denied, 344 U.S. 909, 73

4. We regard Laird v. United Shipyards, Inc., 263 F.2d 12, 15–16 (2 Cir.), cert. denied, 332 U.S. 842, 68 S.Ct. 264, 92 L.Ed. 413 (1947), as without relevance both because of the finding that at the time of the alleged breach of duty "all parties then having any interest in the corporation were fully aware of all the facts," and because the language "Nor is the statute tolled because those alleged to have been derelict in their duty were in control of the corporation," clearly referred to the New York, not the federal, rule.

S.Ct. 328, 97 L.Ed. 701 (1952).[5] In Moviecolor Limited v. Eastman Kodak Co., 288 F.2d 80, 88, 90 A.L.R.2d 252 (2 Cir.), cert. denied, 368 U.S. 821, 82 S.Ct. 39, 7 L.Ed.2d 26 (1961), we again recognized "adverse domination" of a corporation as a basis for tolling the statute with respect to a federal claim, and characterized it as "an exception which, though sometimes bulked with concealment, in fact rests on grounds akin to undue influence or duress." However, we were not required to mark out the boundaries of the doctrine since we found the complaint "falls far short of" alleging control by the wrongdoers.

While the parties have cited many other federal decisions going in various directions, we see little to be gained by detailed analysis of them.[6] Many did not have to, or at any rate did not, distinguish between domination *qua* domination, i. e., as affecting the ability to sue, and domination as effecting concealment. None involved control by a single owner, as distinguished from a majority of more or less guilty directors some of whom might decide that their liability in a suit brought by the corporation would be less than their liability for not bringing one. Almost all were actions in behalf of depositors in insolvent national banks. In some ways that point operates in favor of tolling since it seems hard to charge such creditors with the failures of knowledgeable stockholders or the delinquencies of knowledgeable and independent directors; in other ways it operates against it, because in many cases the facts were known by National Bank Examiners, "the real 'eyes of the bank'" and the Comptroller of the Currency could "compel restitution, resignation, or a receivership." Hughes v. Reed, 46 F.2d 435, 442 (10 Cir. 1931).

[1] One principle emerging with some clarity is that a plaintiff who seeks to toll the statute on the basis of domination of a corporation has the burden of showing "a full, complete and exclusive control in the directors or officers charged." Payne v. Ostrus, 50 F.2d 1039, 1042, 77 A.L.R. 531 (8 Cir. 1931). Such control was found, for example, in Adams v. Clarke, 22 F.2d 957 (9 Cir. 1927), where all the directors were accused of wrongdoing and held a majority of the capital stock, and also in our *Michelsen*, case, supra. This principle must mean at least that once the facts giving rise to possible liability are known, the plaintiff must effectively negate the possibility that an informed stockholder or director could have induced the corporation to sue. And here we think IRCA fails.

[2] While the odds may have been against the likelihood that IRCA's board of directors would have authorized an antitrust action against UF between May 1959 and February 1961, the possibility can by no means be dismissed as negligible. By that time, only four of the old-time directors remained. One of the replacements, Yaeger, would have been highly responsive to a stockholder's demand, see note 2, supra, and this also seems likely as to two others, Ruckle and Cunningham.[7] Nor can we simply assume that the other directors would have been obdurate. While plaintiff cites the Referee's excoriation of the IRCA direc-

5. The opinion distinguished Michelsen v. Penney, supra, as expounding a "federal doctrine," 198 F.2d at 700, applicable to an action to enforce the liability of a national bank director, compare fn. 3, although the *Michelsen* opinion was by no means clear on that point, see 135 F.2d at 415, 416, n. 2.

6. A goodly number are cited in an elaborate footnote to the opinion in Michelsen, 135 F.2d at 416 n. 2. However, Judge Clark's law clerk failed him in one respect; the cases, other than Curtis v. Connly, cited in support of the first sentence should be transposed to the second, and those cited under the second sentence should be transposed to the first.

7. Ruckle regularly gave information to aid Price, another IRCA stockholder elected a director in 1961, in a derivative suit claiming interference by UF with a program of dieselization of IRCA. The record also shows that in 1959 Ruckle, Cunningham and Price met with the attorney for Ripley to discuss the railroad's operation.

tors with whom he was concerned,[8] the very vigor of that then recent expression, its affirmance by the New York courts, the 1958 decree of divestiture in the Government's antitrust suit, and the legal implications of arbitrary refusal to bring an apparently justified suit would hardly have escaped the minds of the directors, and certainly not of counsel to whom they would surely have referred a stockholder's or director's request. See Baker & Cary, Corporations, Cases and Materials 470–71 (1959); cf. Wolf v. Barkes, 348 F.2d 994, 996 (2 Cir.), cert. denied, 382 U.S. 941, 86 S.Ct. 395, 15 L.Ed.2d 351 (1965). In this connection, we find considerable significance in the changed position taken by IRCA in the *Ripley* action where in 1958, after the Referee's decision, it urged that the judgment "should be supported and increased," to reflect the full difference between the rates to UF and to independents. While this could be dismissed as cheap insurance for the directors with no real harm to UF since IRCA was merely supporting a position the plaintiff-stockholders were taking anyway, it is equally reasonable to regard it as meaning that the directors, even before the election of the three independents, had come to recognize their duty to protect the corporation once the spectre of loss of the UF contracts had been dissipated. Taking everything into account,[9] we cannot conclude that a demand on the IRCA directors for the institution of a treble damage action between May 1959 and February 1961 by a stockholder or director would necessarily have been fruitless.[10] UF's control of IRCA thus was no longer "full, complete and exclusive" in the sense here relevant.[11] We

8. "It is difficult to consider with patience the lack of information, inquisitiveness, of prudent care, and of concern of these directors and principal managers of IRCA as testified to by themselves in respect of the very important items of rates and contracts and dealings between their own company, IRCA, and its principal customer-shipper, U. F. Co. These men, it is found, were otherwise as U. F. Co. states it 'upright and honorable men' of high standing and unblemished reputation. * * *"

9. The directors also could not have overlooked the risk of dislodgment despite UF's large stock interest. In the 1952 election five years before the Referee's findings in *Ripley*, the management slate received the votes of only some 51,000 shares other than the 256,000 owned by UF, the independents got some 204,000, and about 80,000 shares, or nearly 15%, did not vote. In an election that would have been featured by cries as to the majority's refusal to authorize a multi million dollar suit against UF arguably called for by the *Ripley* findings and with no risks save the expense of litigation, a considerably larger total vote and an even greater proportion against the UF slate would have been likely. With 95% of the stock voting, UF would have had to retain the suffrage of 29,000 of the independent shares to prevail. Even assembling a respectable management slate would not have been easy under the circumstances.

10. While this issue is one on which plaintiff might have been entitled to take evidence, it raised no objection either in the district court or here to disposition of UF's motion on the affidavits and records submitted, and it has not adverted to any further evidence that might be introduced on this point.

11. IRCA cites Delaware & Hudson Co. v. Albany & Susquehanna R.R., 213 U.S. 435, 29 S.Ct. 540, 53 L.Ed. 862 (1909), which held that shareholders could bring a derivative suit without making the prior demands on management and the shareholder then required by Equity Rule 94 where a majority of the corporation's directors were officers or directors of the corporation alleged to have inflicted the injury, and the latter owned 22.9% of the injured corporation's stock. It argues that the question in that case was whether the plaintiffs could reasonably assume that management itself would not bring a suit in the corporation's interests when a majority of the board of directors was controlled by the prospective defendant; that the Supreme Court held in the affirmative; and that the question in this case is the same. Quite apart from the important distinction that only one of IRCA's directors in 1959 was an officer or director of UF, the problems are dissimilar. The basis for barring a derivative suit without prior demand is simply the lack of reason for such an action if the corporation is willing to sue itself, a principle adopted for the benefit of the very corporation that would profit from successful prosecution of the suit. We here enforce the important policy of the statute of limitations in protecting a defendant from stale claims; a court should require a clear showing before applying a judicially created exception. Although the question asked in the two situations thus may be formally the same, a plaintiff must go further in negating the possibility of suit by the corporation in the situation here *sub judice* since tolling the statute of limitations is far stronger medicine than dispensing with a demand as a condition to the bringing of a derivative action and will impinge upon different interests.

12. Indeed, disregard of the statute of limitations might impede efforts by the Government to obtain divestitures by consent. If UF had retained its stock ownership in IRCA, it would have shared *pro tanto* in any recovery from itself; a controlling stockholder may well be reluctant to sell, at a price reflecting only usual business considerations, if the corporation under new ownership can recover treble damages reaching over decades. And there is surely some anomaly in a doctrine whereby although there could be no recovery against a former 100% stockholder, and a present 90% stockholder would suffer to the extent of only 10% of the amount recovered in a derivative action, 100% damages without limit of time could be obtained after a 90% stock interest was divested at a price in no way reflecting the claim.

13. Recovery of the damages sought, without taking account of income taxes, would amount to some $815 for each share of IRCA, and to some $62 per share of UF, currently selling around $31. While the *ad damnum* may be on the optimistic side and income taxes and deductions would cut the amounts roughly in half, the figures remain huge. Yet 68% of the common stock of IRCA is owned by a recent purchaser, and some notion as to how few of the minority stockholders date back to an early period is conveyed by the fact that of the 26 plaintiffs in the *Ripley* action, brought in 1939, only two had acquired their stock before 1945.

thus leave for another day the more difficult question whether or under what circumstances the mere possibility of suit by an informed stockholder or director would end tolling due to "domination" of a corporation by the alleged wrongdoer.

In upholding the partial defense of limitations in this case, we are thoroughly mindful that "[t]he treble-damage action was intended not merely to redress injury to an individual through the prohibited practices, but to aid in achieving the broad social object of the statute", Karseal Corp v. Richfield Oil Corp., 221 F.2d 358, 365 (9 Cir. 1955), and "for the purpose of multiplying the agencies which would help enforce the antitrust laws and therefore make them more effective." Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F.2d 891, 893 (5 Cir. 1954), cert. denied, 348 U.S. 912, 75 S.Ct. 292, 99 L.Ed. 715 (1955). See United States v. Borden Co., 347 U.S. 514, 518, 74 S.Ct. 703, 98 L.Ed. 903 (1954). But one may well question how far these policies would be furthered by a rule that would often permit the collection of treble damages accruing over decades and thus might seem rather an overkill.[12] Moreover, the statute of limitations itself embodies a strong policy "to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." Order of R.R. Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348, 349, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). There could hardly be a better case for enforcing the policy than this, where UF has already suffered two judgments for its misdeeds and recovery of damages for more than three decades would result in a huge windfall to most of the present stockholders of IRCA and an unexpected loss to many innocent ones of UF.[13]

Since IRCA has not met its burden of demonstrating that, after the election of the three independent directors in 1959, UF had such "full, complete and exclusive control" as to rule out the possibility of a corporate suit against it, on the demand of a stockholder or director, for antitrust violations the facts giving rise to which had become well-known, any tolling of the statute ended at least by that time. In consequence the District Court properly held that all claims under the anti-

trust laws arising prior to February 16, 1961, were barred by limitations.

III.

Our holding on the statute of limitations reduces the importance of the branch of UF's motion based on the rule against splitting a cause of action almost but not entirely to the vanishing point. With all claims prior to February 16, 1961, save so much of the fifth as concerns breach of contract,[14] barred by the four-year statute, the only remaining ones that would be excluded by the splitting rule are the antitrust claims relating to the period between that date and the dissipation of the effects of UF's control consequent on the sale of its stock in January 1962. Moreover, the second claim may have scant practical application to that relatively recent period in view of the provisions for rate increases in the *Ripley* judgment.

Starting from the doctrine that a plaintiff must recover all damages arising from given operative facts in a single action, Restatement, Judgments, § 62, defendant contends that the facts relied on by IRCA for recovery under the antitrust laws in this action are the same as those sued on by its stockholders in *Ripley*. Plaintiff disputes this; it claims that the rule against splitting is inapplicable when the first suit was brought in a forum which lacked power to give the relief sought in the second, thereby distinguishing such cases as Williamson v. Columbia Gas & Elec. Corp., 186 F.2d 464 (3 Cir. 1950), cert. denied, 341 U.S. 921, 71 S.Ct. 743, 95 L.Ed. 1355 (1951), Norman Tobacco & Candy Co. v. Gillette Safety Razor Co., 295 F.2d 362 (5 Cir.1961), and Engelhardt v. Bell & Howell Co., 327 F.2d 30 (8 Cir.1964); and it argues that in no event should the rule be applied when a forum without power to give full relief was chosen not by the corporation now plaintiff but by stockholders forced to act in its behalf because of an unwillingness to sue dictated by the defendant, especially when they were ignorant of antitrust violations when the suit was brought.[15]

On the point of fact raised by the argument, the situation seems as follows: The gravamen of the *Ripley* complaint was the unduly and discriminatorily favorable rates accorded UF on its own shipments (the claim asserted as Second in the instant action) and the rate divisions on coffee exports and commodity imports; nothing in it can fairly be read as raising the claims now asserted as First or Fourth, and the Sixth is a different ground for the damage claims previously asserted. The proof, however, appears to have taken a wider range and the Referee made many findings relevant to what are now the First and Fourth claims, although he repeatedly made clear,[16] as did the New York Court of Appeals, that claims for violations of the antitrust laws were not at issue. See 8 N.Y.2d at 446, 209 N.Y.S.2d at 300, 171 N.E.2d 443. The *Ripley* plaintiffs did not seek a judgment for the loss of the traffic of independents. While they did request judgment in excess of $8,000,000 for unfair divisions on export traffic, the Referee declined to grant any, evidently considering that the proof showed only that IRCA had been forced to reduce its own rates to meet truck competition.

To support its position that the action in the New York courts, which lack pow-

14. Although the District Court's judgment dismissed so much of the third and fifth claims as related to matters occurring before February 16, 1961, "on the ground of *res judicata*," this direction as to the fifth does not accord with the language or theory of the opinion, see 254 F.Supp. at 239.

15. Plaintiff also argues that when the *Ripley* action was brought in 1949, we had not yet decided Fanchon & Marco, supra, 202 F.2d 731, 36 A.L.R.2d 1336, holding that derivative actions for violations of the antitrust laws would lie, but we do not consider that point to have substance.

16. At the instance of counsel for UF, the Referee sustained objections to arguments and evidence which were relevant only to antitrust violations and not to breaches of fiduciary duty.

er to grant relief under the antitrust laws, could not preclude a later federal treble damage suit, plaintiff relies heavily on Judge L. Hand's well-known holding, in Lyons v. Westinghouse Elec. Corp., 222 F.2d 184 (2 Cir.), cert. denied, 350 U.S. 825, 76 S.Ct. 52, 100 L.Ed. 737 (1955), that a state court's overruling of an antitrust defense would not bar a federal suit for treble damages brought by the state court defendant. Defendant distinguishes this, as did the district judge, 254 F.Supp. at 237–238, on the basis that there it was the antitrust defendant, not the antitrust plaintiff, who invoked the state forum. Defendant further asserts that, whatever may be thought of plaintiff's distinction of *Williamson* and the other cases cited above, this cannot explain away our old decision in Straus v. American Publishers' Ass'n, 201 F. 306 (2 Cir.1912), appeal dismissed, 235 U.S. 716, 35 S.Ct. 197, 59 L.Ed. 438 (1914). Straus had first sued in a New York court under the state and federal antitrust laws for an injunction and damages with respect to an agreement to fix prices of books, and the Court of Appeals had held the agreement valid as to copyrighted although not as to uncopyrighted works. While Straus' appeal to the Supreme Court was pending, he sued in the district court under the federal antitrust act alone. This court held the state judgment conclusive, the opinion saying in one breath that the state court was without jurisdiction of the complaint founded on the federal statute and in the next that the "question was actually involved in the cause before the state court, which was competent to decide it." The Supreme Court later reversed the New York judgment on the merits, 231 U.S. 222, 34 S.Ct. 84, 58 L.Ed. 192 (1913), making a remark equally hard for modern ears to understand: "This view of the case renders it unnecessary to decide whether an original action can be maintained in the state courts, seeking an injunction, and to recover damages under the Sherman Law." 231 U.S. at 237, 34 S.Ct. at 88.

The *Straus* case is not directly in point since it held the federal plaintiff barred not by failure to assert a federal claim in the state court but by the state judgment against him upon it. Even as to that, however, Judge L. Hand overruled *Straus* in denying a petition for rehearing in *Lyons*, supra, 222 F.2d at 195. We think it was well overruled even though, as defendant urges, it perhaps did not need to be in order to support the *Lyons* result.

[3] Since what *Lyons* said in overruling *Straus* would necessarily mean that a judgment in favor of a state court defendant in an action seeking relief under the federal antitrust laws would not bar a subsequent federal suit,[17] it does seem hard to understand how a plaintiff's successfully suing in a state court on a claim that might have been but was not made the basis for antitrust relief can have a larger effect. Compare Restatement, Judgments, § 62, Comment on Clause (a), p. 255.[18] We find it unnecessary to decide this, however, since our ruling as to the statute of limitations brings the case to us in a posture, generally limited to damages suffered after February 16, 1961, quite different from

17. We do not deal here with a case where the jurisdiction of the state court was challenged and upheld by it, albeit erroneously. See Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85 (1939); Alleghany Corp. v. Kirby, 340 F.2d 311, 312, n. 1 (2 Cir.), cert. granted, Holt v. Alleghany Corp., 381 U.S. 933, 85 S.Ct. 1772, 14 L.Ed.2d 698 (1965), dismissed, 384 U.S. 28, 86 S.Ct. 1250, 16 L.Ed.2d 335 (1966).

18. Section 62k of the Restatement suggests that where the plaintiff sues in a court whose sovereign cannot or has not made available a court which can afford the plaintiff relief for his entire cause of action, there is no bar to a subsequent suit on the unredressed portion of that cause of action in the court of another sovereign which does afford such relief. This seems much closer to the case at bar than the rule of § 62j, relied on by the district judge, 254 F.Supp. at 238, which deals with a prior suit brought in a court of limited jurisdiction where the sovereign has made available another court with jurisdiction to grant all the relief sought.

that in which the issue was considered by the district judge. "On the whole, the principle against splitting is a salutary doctrine" but "inflexibly applied there can be little doubt that it results at times in unwarranted hardship." 1B Moore, Federal Practice ¶ 0.410[2] at 1169 (2d ed. 1965). It surely was not incumbent on the stockholders who brought the *Ripley* action in 1949 to recover all damages IRCA might sustain until the end of time from acts of UF of the sort there attacked, even those incurred after the period, through 1960, as to which proof of damages was made. Indeed, if the prior judgment had been in a federal treble damage suit by the corporation, it would not preclude recovery for subsequent antitrust violations. Lawlor v. National Screen Service Corp., 349 U.S. 322, 75 S.Ct. 865, 99 L.Ed. 1122 (1955). The complaint should therefore not have been dismissed as to claims within the appropriate period of limitations.

IV.

Plaintiff's appeal from the denial of its motion for partial summary judgment is without merit. Since the *Ripley* complaint did not and could not properly have asserted a claim under the federal antitrust laws, the judgment cannot have adjudicated that UF violated them; on this point the overruling of Straus, supra, 201 F. 306, by Lyons, supra, 222 F.2d 184, works for the defendant. The utmost effect the prior judgment could have had in this action on any view would thus have been as an estoppel on questions of fact actually litigated; and we need not now decide how far it would even have that. See Restatement, Judgments, §§ 68 and 71, and Lyons, supra, 222 F.2d at 195-196. With this action limited to damages after February 16, 1961, save on the contract claim which plaintiff does not contend to have been considered in *Ripley*, the role of the findings and judgment in the prior action is even more limited.

The judgment is affirmed insofar as it barred claims for damages under the antitrust laws accruing before February 16, 1961, is reversed insofar as it went beyond this, and is affirmed insofar as it denied plaintiff's motion for partial summary judgment. No costs.

BEST COPY AVAILABLE

Appendix D

SIDNEY BENDER
Counselor at Law
Chrysler Building
New York 17, N.Y.

September 9, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
U.S. Courthouse
Foley Square
New York, New York 10007

Re: International Railways of Central America v. United Brands and International Railways of Central America v. Compania Agricola de Guatemala - No. 75-7166 and No. 75-7165

Dear Mr. Fusaro:

I represent International Railways of Central America, the plaintiff-appellant in the above captioned matter; the defendants-appellees are United Brands Company and its wholly owned subsidiary, Compania Agricola de Guatemala. The New York Law Journal, dated April 10, 1975, stated that Maurice C. Kaplan, a director and member of the Executive Committee of United Brands Company was appointed Dean of the Touro Law School. The same article referred to the appointment of the initial members of the board of visitors of the Touro Law School including the Honorable William H. Mulligan, Judge of the United States Court of Appeals for the Second Circuit.

The Proxy Statement of United Brands Company, dated July 11, 1975, stated that on April 7, 1975, Mr. Kaplan resigned all his positions with United Brands except his directorship which continued until August 18, 1975, the date for the election of new directors at the annual meeting of stockholders. That same Proxy Statement states that United Brands will pay Mr. Kaplan monthly deferred compensation for five years from May 31, 1975.

Canon 2 of the Code of Judicial Conduct, ¶A, provides in pertinent part that "A Judge ... should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Without impugning the integrity or impartiality of Judge Mulligan, nevertheless because of the relationship of Judge Mulligan and Mr. Kaplan the "public confidence in the integrity and impartiality of the judiciary" would, I respectfully submit, be impaired if Judge Mulligan sat in the above captioned appeal.

Under the circumstances, the undersigned hereby respectfully requests that Judge Mulligan disqualify himself from participating in the determination of the aforementioned appeal.

Sincerely,

s/Sidney Bender

SB:dr

cc: Kaye,Scholer,Fierman,Hays & Handler
Attorneys for Defendants-Appellees

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
New York, N.Y. 10007

Chambers of
WILLIAM HUGHES MULLIGAN
Circuit Judge
1 Federal Plaza

October 8, 1975

Sidney Bender, Esq.
Chrysler Building
New York, New York 10017

Dear Mr. Bender:

Re: International Railways of Central America v. United Brands and International Railways of Central America v. Compania Agricola de Guatemala - No. 75-7166 and No. 75-7165

I am in receipt of a copy of your letter to Mr. A. Daniel Fusaro, Clerk of the United States Court of Appeals which indicated that Maurice C. Kaplan, the Dean of the Touro Law School had been a director and member of the executive committee of the United Brands Company. You suggest that in view of my relationship with Mr. Kaplan I should disqualify myself from hearing the appeal.

As a matter of fact, on April 8, 1975 I resigned from the Board of Visitors of the Touro Law School. I never attended any meetings of that Board and indeed, to my knowledge, there were none. I did not participate in any way in Mr. Kaplan's

election to the deanship and in fact, to the best of my knowledge, I have never met him or been associated with him in any capacity.

In view of these facts I trust that you will withdraw your request that I disqualify myself.

Very truly yours,

s/ Wm H Mulligan

William Hughes Mulligan
United States Circuit Judge

cc: Mr. A. Daniel Fusaro
cc: Kaye, Scholer, Fierman, Hays & Handler

SIDNEY BENDER
Counselor At Law
Chrysler Building
New York 17, N.Y.

October 30, 1975

Hon. William Hughes Mulligan
Circuit Judge
U.S. Court of Appeals
Second Circuit
New York, New York 10007

Re: International Railways of Central America v. United Brands and International Railways of Central America v. Compania Agricola de Guatemala - No. 75-7166 and No. 75-7165

Dear Judge Mulligan:

Receipt of your letter of October 8, 1975 is acknowledged. The delay in responding to your letter resulted from my unsuccessful attempt to obtain certain information from Touro Law School.

To supplement my letter of September 9, 1975, in addition to the New York Law Journal dated April 10, 1975, the publication entitled "The Jewish Week" dated April 26, 1975 stated:

> "Maurice C. Kaplan has been appointed Dean of the Touro Law School and of the Celler Graduate School of Law, it was announced this week by Bernard Lander, president of Touro College, and by Eugene V. Rostow of the Yale Law School faculty, who is director of planning for Touro Law School. The school will open in September.

"Professor Rostow also announced the appointment of the initial members of the Board of Visitors of the Touro Law School. Under Professor Rostow's chairmanship, the board includes Judge William H. Mulligan, former dean of the Fordham University Law School and Judge of the United States Court of Appeals for the Second Circuit ..."
(underlining supplied).

Since "The Jewish Week" stated that Touro, as late as the week commencing April 20, 1975, had stated that you were a member of the Board of Visitors of Touro Law School, you were publicly identified as thus associated with Mr. Kaplan, and so without in any way impugning your expressed position, I respectfully decline to withdraw my request that you disqualify yourself from participating in the determination of the aforementioned appeal.

Respectfully,

s/ Sidney Bender

SB:dr

cc: Mr. A. Daniel Fusaro
Kaye, Scholer, Fierman, Hays & Handler

SIDNEY BENDER
Counselor At Law
Chrysler Building
New York 17, N.Y.

November 7, 1975

Hon. William Hughes Mulligan
Circuit Judge
U.S. Court of Appeals
Second Circuit
New York, New York 10007

Re: International Railways of Central America v. United Brands and International Railways of Central America v. Compania Agricola de Guatemala - No. 75-7166 and No. 75-7165

Dear Judge Mulligan:

With further reference to my letter to you dated October 30, 1975, I am enclosing a copy of a self-explanatory note from The University of the State of New York, The State Education Department, which I received this date.

Respectfully,

s/Sidney Bender

SB:dr
Enclosure

cc: A. Daniel Fusaro, Clerk
Kaye, Scholer, Fierman, Hays & Handler,Esqs.

THE UNIVERSITY OF THE STATE OF NEW YCRK
THE STATE EDUCATION DEPARTMENT

Referred to ...Mr. Sidney Bender
By.....Byron P. Connell
Date.....11-5-75

As of May 13, 1975, the following persons are members of the board of visitors of the school of law at Touro College:

Eugene Rostow, Chairman

Hon. William H. Mulligan, United States Second Circuit Court of Appeals, formerly Dean, Fordham Law School.

Professor Ray Forrester, Robert S. Stevens, Professor of Law and former Dean, Cornell Law School.

Dean Bernard Wolfman, University of Pennsylvania Law School.

Dean Abraham S. Goldstein, Yale Law School

Hans J. Frank, Esq., Senior Partner, Fried, Frank, Harris, Shriver and Jacobson.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
New York, N.Y. 10007

Chambers of
WILLIAM HUGHES MULLIGAN
Circuit Judge
1 Federal Plaza

Re: International Railways of Central America v. United Brands and International Railways of Central America v. Compania Agricola de Guatemala No. 75-7166 and No. 75-7165

November 10, 1975

Sidney Bender, Esq.
Chrysler Building
New York, New York 10017

Dear Mr. Bender:

I have your letter of November 7th indicating that as of May 13th I was still listed as a member of the Board of Visitors of the School of Law at Touro College. I have written to Mr. Eugene Rostow asking him to correct the records and recalling to him my letter of April 8, 1975 in which I withdrew from the Board.

In view of this fact I find that there is absolutely no reason for me to disqualify myself in this case.

Sincerely yours,

s/Wm H Mulligan

William Hughes Mulligan
United States Circuit Judge

cc: Mr. A. Daniel Fusaro
Kaye, Scholer, Fierman, Hays & Handler,Esqs.

YALE UNIVERSITY
LAW SCHOOL
NEW HAVEN, CONNECTICUT

EUGENE V. ROSTOW

November 14, 1975

Sidney Bender, Esq.
405 Lexington Avenue
Suite 3701
New York, New York 10017

Dear Mr. Bender:

My filing system failed to turn up a copy of Judge Mulligan's letter of resignation from the Board of Overseers of the Touro Law School, at least on first search. I have asked President Lander of Touro College to send you a copy. His files have the original.

Yours sincerely,

s/Eugene V. Rostow

EVR/dm

cc: Dr. Lander

YALE UNIVERSITY
LAW SCHOOL
NEW HAVEN, CONNECTICUT

EUGENE V. ROSTOW

November 25, 1975

Sidney Bender, Esq.
405 Lexington Avenue
Suite 3701
New York, New York 10017

Dear Mr. Bender:

There was a snafu. The copy of the missing letter was sent to me rather than to you. Here it is.

Yours sincerely,

s/Eugene V. Rostow

EVR/dr

Enc.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
NEW YORK, N.Y. 10007

Chamber of
WILLIAM HUGHES MULLIGAN
Circuit Judge
1 Federal Plaza

Unofficial

April 8, 1975

Mr. Eugene V. Rostow,
Director of Planning
Touro College School of Law
30 West 44th Street
New York, New York 10036

Dear Gene:

I regret very much that I must withdraw as a member of the Board of Visitors of the Touro Law School. Not having heard from you in such a long time and also having read of the financial problems of the school, I was reasonably sure that the project was dead. In any event, I have taken on other extra-curricular activities which make it impossible for me to devote any time to the new school. As you know, I wish you well.

Sincerely yours,

s/Bill

William Hughes Mulligan

LEVENTRITT LEWITTES & BENDER
Attorneys
Chrysler Building
New York, N.Y. 10017

December 19, 1975

Mr. Byron P. Connell
University of the State of New York
State Education Department
Albany, New York 12234

Dear Mr. Connell:

This is to confirm our conversation of December 11, 1975 that Associate Commissioner Leuallene spoke with Dr. Lander of Touro College on May 13, 1975 and at that time Dr. Lander advised him that the Hon. William H. Mulligan was as of that date, a member of the Board of Visitors of Touro Law School.

If this letter does not properly state the substance of our conversation of December 11, 1975 I would appreciate your advising me.

Thank you for your cooperation.

Sincerely yours,

s/Sidney Bender

SB:dr

APPENDIX C

Statutes.

15 U.S.C. § 1, provides in pertinent part, as follows:

"TRUSTS, ETC., IN RESTRAINT OF TRADE ILLEGAL . . . PENALTY

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . . Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 2:

"MONOPOLIZING TRADE A MISDEMEANOR; PENALTY

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

15 U.S.C. § 8:

"TRUSTS IN RESTRAINT OF IMPORT TRADE ILLEGAL; PENALTY

Every combination, conspiracy, trust, agreement, or contract is declared to be contrary to public policy,

illegal, and void when the same is made by or between two or more persons or corporations, either of whom, as agent or principal, is engaged in importing any article from any foreign country into the United States, and when such combination, conspiracy, trust, agreement, or contract is intended to operate in restraint of lawful trade, or free competition in lawful trade or commerce, or to increase the market price in any part of the United States of any article or articles imported or intended to be imported into the United States, or of any manufacture into which such imported article enters or is intended to enter. Every person who shall be engaged in the importation of goods or any commodity from any foreign country in violation of this section, or who shall combine or conspire with another to violate the same, is guilty of a misdemeanor, and on conviction thereof in any court of the United States such person shall be fined in a sum not less than $100 and not exceeding $5,000, and shall be further punished by imprisonment, in the discretion of the court, for a term not less than three months nor exceeding twelve months."

15 U.S.C. § 15:

"SUITS BY PERSONS INJURED; AMOUNT OF RECOVERY

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 15b:

"LIMITATION OF ACTIONS

Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

15 U.S.C. § 18 (1946 ed.) prior to its amendment in 1950, provided in pertinent part, as follows:

"ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

"This section shall not apply to corporations purchasing such stock solely for investment and not using

the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

"Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided,* That nothing in this section shall be held or construed to authorize or make lawful anything hereto-

fore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided. . . ."